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IN THE

Supreme Court of the United States

October Term, 1969

No. ------ 458

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, Sr.; JOHN L. HUNT;
ROBERT W. OSMOND;
ALFRED STANLEY HUGHES, Jr.;
JAMES H. HUNT; FRANCIS X. RAUSCH,
Petitioners,

v.

THE COMMONWEALTH OF
MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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1. The magazines involved in the prosecutions herein are not obscene in the constitutional sense and are protected expression under the First and Fourteenth Amendments to the Constitution of the United States. The judgments of conviction against Petitioners under Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A as amended, based upon sale or possession of the aforesaid magazines results in an unconstitutional application of said statute, contrary to the express guarantees of the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution	22
2. Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended by Chapter 492, Section 2 (1959 statutes) is repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States because of its failure, as written, by its terms to require scienter as an element of	

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the offense, and hence an abridgment of Petitioners' rights to freedom of speech and press and Due Process under the said provisions of the Constitution 43

3. Even if the statute C.H. 272 G.L.S. 28A is by judicial construction interpreted as though it contained the element of scienter, then the said statute has been unconstitutionally applied by the Commonwealth in the prosecution of the cases at bar for failure to charge the element of scienter against each of the petitioners in the criminal complaints upon which said prosecutions were based 47

4. If the obscenity statute is judicially construed to contain the element of scienter and the criminal complaints on which the charges and prosecution are based may be judicially construed as though they contain the element of scienter, the convictions rendered in the absence of proof of scienter against Petitioners herein unconstitutionally abridge the Petitioners' freedom of speech and press and arbitrarily deprive persons including Petitioners of liberty and property without Due Process of law contrary to the Free Speech and Press and Due Process provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States 51

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IN THE

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October Term, 1969

No. _ _ _ _ _ _

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, Sr.; JOHN L. HUNT;
ROBERT W. OSMOND;
ALFRED STANLEY HUGHES, Jr.;
JAMES H. HUNT; FRANCIS X. RAUSCH,
Petitioners,

v.

THE COMMONWEALTH OF
MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered in the above-entitled case on May 2, 1969.

Opinion Below.

Petitioners Charles Johnson, Leo Marangi, John L. Hunt, Robert W. Osmond, Alfred Stanley Hughes, Jr., and James H. Hunt were tried in the Superior Court for Criminal Business, County of Suffolk, Boston, in the Commonwealth of Massachusetts before His Honor, Robert H. Beaudreau sitting without a jury because the Defendants had waived their right to trial by jury, and on April 25, 1968, he made a finding of guilty. No written opinion was rendered by the trial judge.

Petitioners Joseph M. Palladino, Sr. and Francis X. Rausch, were tried on April 16-18, 1968, and was decided by His Honor Robert H. Beaudreau on April 26, 1968, after he had considered the case for Petitioners Johnson, et al. In this instance the Court sat without a jury, Defendants having waived the same, and made a finding of guilty. No written opinion was rendered by the trial judge.

The two sets of cases tried by His Honor, Judge Beaudreau were thereafter consolidated and considered as one case for the purposes of appeal and assigned the Docket Number S-14, 271, April Sitting 1969.

The Supreme Judicial Court for the Commonwealth of Massachusetts in a rescript entered on or about May 2, 1969, affirmed. The affirmation by the Court is attached as Appendix A hereto. No written opinion was filed. A due and timely Petition for Rehearing was filed and finally denied on May 12, 1969, by the Supreme Judicial Court without written opinion, by letter which is attached as Appendix B hereto. No written opinion was filed. A due and timely Petition for

Rehearing was filed and finally denied on May 12, 1969, by the Supreme Judicial Court without written opinion, by letter which is attached as Appendix B hereto.

Jurisdiction.

The judgment of the Superior Court for Criminal Business for the County of Suffolk was entered as against Petitioners Charles Johnson, Leo Marangi, John L. Hunt, Robert W. Osmond, Alfred Stanley Hughes, Jr., and James H. Hunt, on April 25, 1968, and the judgment as to Petitioners Joseph M. Palladino, Sr. and Francis X. Rausch was entered by said Court on April 26, 1968. On May 2, 1969, the rescript of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered denying the finding of error. A Petition for Rehearing in case No. S-14,271 before the Supreme Judicial Court for the Commonwealth of Massachusetts was denied on May 12, 1969, and the judgment was thus final. *Chicago G.P.R. Company v. Basham*, 249 U.S. 164. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257[3].

Questions Presented.

1. Whether the General Laws of Massachusetts, Chapter 272, Section 28A, as construed and applied herein to authorize conviction of the Petitioners upon the ground that certain magazines are obscene and not entitled to constitutional protection, abridges the exercise of freedom of speech and press and deprives Petitioners of their liberty and property without due process of law contrary to the free speech and press provisions of the First Amendment and the Due Process clause of the Fourteenth Amendment as the same

have been delineated by decisions of the Supreme Court of the United States.

2. Whether the magazines which were the basis of Petitioners' convictions by the Court are obscene in the constitutional sense, absent any evidence or suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; and absent evidence of the sort of pandering which the Supreme Court deemed significant in *Ginzburg v. U.S.*, 383 U.S. 463, and in which there is no claim asserted that the statute (Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended) reflects a specific and limited Commonwealth concern for juveniles.

3. Whether Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended by Chapter 492, Section 2 (1959 statutes) is repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States because of its failure, as written, by its terms to require scienter as an element of the offense, and hence an abridgment of Petitionprs' rights to freedom of speech and press and Due Process under the said provisions of the Constitution.

4. Whether, if the statute is construed by judicial construction as though it contained the element of scienter, whether the same has been unconstitutionally applied by the Commonwealth in the prosecution of the cases at bar for failure to charge the element of scienter in the criminal complaints upon which said prosecution is based.

5. Whether, if the statute may be judicially construed to contain the element of scienter and the criminal complaint on which the charges and prosecution are based may be judicially construed as though they contain the element of scienter, do the convictions rendered in the absence of proof of scienter against Petitioners herein unconstitutionally abridge the Petitioners' freedom of speech and press and arbitarily deprive persons including Petitioners of liberty and property without Due Process of law contrary to the Free Speech and Press and Due Process provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

6. .Whether Chapter 272, Section 28A of the General Laws of Massachusetts, as construed and applied herein to authorize the conviction of Petitioners without any proof that the magazines involved herein exceed the limits of candor in the nation as a whole in the depiction or reperesentation of matters pertaining to sex and nudity or appeal to prurient interest or are utterly without social importance, and where the record being considered in conjunction with the exhibits affirmatively establishes that the magazines are not obscene in the constitutional sense and are entitled to constitutional protection, deprives Petitioners of their liberty and property without Due Process of law and abridges the exercise of Freedoms of Speech and Press, contrary to the free speech and press and Due Process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United

States and the provisions of Chapter 272, Section 28A of the General Laws of Massachusetts are set forth in Appendix C. hereto.

Statement of the Case.

a. With the exception of Complaints No. 34142 and No. 34143 with respect to Petitioner Marangi which originated in the Municipal Court of the Roxbury District, Petitioners were charged in complaints originating in the Municipal Court of the City of Boston, Commonwealth of Massachusetts, with violation of the obscenity statute of the Commonwealth (Chapter 272, General Laws of the Commonwealth of Massachusetts, Section 28A). The following is a list of Superior Court complaint numbers, Petitioners' names, titles of the magazines alleged to be obscene, and the offenses charged:

Complaint No.	Petitioner	Magazines	Offense
34330	Joseph M. Palladino the elder	Exciting #15	Possession with intent to sell (2/7/68)
34983	Joseph N. (sic) Palladino	Wonder Girl #1	Sale (3/19/68)
35273	Joseph N. Pallidnio (sic) Sr.	Cover Girl #8	Possession with intent to sell (4/2/68)
34984	Francis X. Rausch	Countess #1 and Cover Girl #8	Sale (3/23/68)
34073	Charles Johnson	Exciting	Possession with intent to sell (1/31/68)
34074	Charles Johnson	Exciting	Sale (1/31/68)
34682	Charles Johnson	Cover Girl #12	Possession with intent to sell (3/2/68)

34929	Charles Johnson	Cover Girl and Wonder Girl	Possession with intent to sell (3/19/68)
34142	Leo Marangi	Exciting	Sale (2/7/68)
34143	Leo Marangi	Exciting	Possession with intent to sell (2/7/68)
34590	John L. Hunt	Suzette	Sale (2/29/68)
34591	John L. Hunt	Suzette	Possession with intent to sell (2/29/68)
34832	John L. Hunt	Suzette	Possession with intent to sell (3/9/68)
34833	John L. Hunt	Cover Girl	Possession with intent to sell (3/9/68)
34593	Robert W. Osmond	Cover Girl	Sale (2/29/68)
34594	Robert W. Osmond	Cover Girl	Possession with intent to sell (2/29/68)
34681	Stanley Hughes	Cover Girl	Sale (2/2/68)
34926	James Hunt	Countess and Estoria	Possession with intent to sell (3/18/68)
34927	James Hunt	Les Girls	Sale (3/22/68)
34928	James Hunt	Gymn	Possession with intent to sell (3/22/68)

All of the complaints upon which prosecution against Petitioners herein were had, with slight modifications of language reflecting the literary style of the law enforcement officer drafting the particular complaint, charge the offenses of "sale" or "possession with intent to sell" in essentially the same language, but in all instances without charging the element of "scienter" or "guilty knowledge" as scienter has been variously defined by the Supreme Court of the United States (*Morissette v. U.S.*, 342 U.S. 246). In none of the complaints upon which prosecution against Petitioners herein were had, were any of the Petitioners herein charged with

violation of a specific cited statute or ordinance. (The complaint in complaint No. 34330 is appended hereto as Appendix D and reflects an example of the language used in the remaining complaints.).

The complaints and the language employed in the other criminal charges are reported in the *Consolidated Summary of Record and Assignment of Errors*, out of the Superior Court for the Transaction of Criminal Business, County of Suffolk, Commonwealth of Massachusetts, filed with the records of the Court as follows:

Complaint No.	Petitioner	Page Designation in Consolidated Summary of Record and Assignments of Errors
34983	J. N. Paladino (sic)	127
35273	Joseph N. Pallidnio (sic) Sr.	143
34984	Francis X. Rausch	133
34073	Charles Johnson	2
34074	Charles Johnson	13
34142	Leo Marangi	19
34143	Leo Marangi	27
34590	John L. Hunt	47
34591	John L. Hunt	55
34593	Robert W. Osmond	61
34594	Robert W. Osmond	69
34681	Alfred Stanley Hughes	75
34682	Charles Johnson	83
34832	John J. (sic) Hunt	89

34833	John J. (sic) Hunt	95
34926	James H. Hunt	101
34927	James E. (sic) Hunt	109
34928	James H. Hunt	115
34929	Charles Johnson	121

All convictions against Petitioners in the various Municipal Courts of the County of Suffolk were assigned for trial to the Honorable Robert H. Beaudreau, Judge, and the same stood for trial *de nova*.

The cases against Petitioners Charles Johnson, Leo Marangi, John L. Hunt, Robert W. Osmond, Stanley Hughes and James Hunt were heard by Judge Beaudreau, jury waived, on April 25, 1968, and all were found guilty of the offense or offenses charged.

The cases against Petitioners Joseph M. Palladino, Sr. and Francis X. Rausch, were heard by Judge Beaudreau, jury waived, on April 16-18, 1968, and decision rendered on April 26, 1968, and both were found guilty of the offense or offenses charged.

The Superior Court Judge then imposed the following sentences:

Complaint No.	Petitioner	Sentence
34330	Joseph M. Palladino, Sr.	$3,000.00 fine
34983	Joseph N. Paladino (sic)	Three (3) Months House of Correction
35273	Joseph N. Pallidino (sic)	Three (3) Months House of Correction (Concurrent with 34983)
34984	Francis X. Rausch	$50.00 fine
34073	Charles Johnson	$200.00 fine
34074	Charles Johnson	$200.00 fine
34142	Leo Marangi	$1,000.00 fine
34143	Leo Marangi	$200.00 fine
34590	John L. Hunt	$200.00 fine
34591	John L. Hunt	$200.00 fine
34593	Robert W. Osmond	$200.00 fine
34594	Robert W. Osmond	$200.00 fine
34681	Alfred S. Hughes, Jr.	$50.00 fine
34682	Charles R. Johnson	Six (6) Months House of Correction
34832	John J. (sic) Hunt	Three (3) Months House of Correction
34833	John J. (sic) Hunt	Three (3) Months House of Correction (Concurrent with 34832)
34926	James H. Hunt	Nine (9) Months House of Correction
34927	James E. (sic) Hunt	Nine (9) Months House of Correction (Concurrent with 34926)

34928	James H. Hunt	Nine (9) Months House of Correction (Concurrent with 34926)
34929	Charles Johnson	Six (6) Months House of Correction (Concurrent with 34682)

In none of the cases presented was there any evidence adduced by the Commonwealth on the issue of the prurient appeal, if any, the patent offensiveness, if any, or the absence of social value of each of the magazines. The magazines themselves were put into evidence.

The testimony established that the magazines were being sold in adult only stores, displayed on magazine racks, enclosed within transparent plastic bags. (Palladino Transcript Page 28.)

No evidence was presented that any of the Petitioners had "guilty knowledge" that the magazines being offered for sale in non-obtrusive circumstances, were obscene.

Typical of the conclusory assertions by police officers that the magazines charged against Petitioners herein were obscene, is the rather unconstitutional test admittedly applied by one of the officers, Paul Rufo, who in reply to the question of counsel inquiring as to the test employed by the officer in determining probable cause for arrest without a warrant of obscenity, stated:

> "(The Witness) 'Well, I wouldn't bring that book into my house and leave it on the kitchen table'."

To which response, defense counsel asked:

> "Then that is the criteria that you used to determine whether it was obscene. Whether it could be left on the kitchen table?"

The response of the arresting police officer to that question was:

> "That is right."

(See Palladino Transcript, April 16, 1969, Pages 90 and 91)

The Petitioners' cases decided by Judge Beaudreau on April 25 and 26, 1968, were consolidated for appeal purposes before the Supreme Judicial Court of the Commonwealth of Massachusetts. The appeal was denied (see Appendix A) without written opinion and Motion for Rehearing was denied (see Appendix B) without written opinion.

How Federal Questions are Presented.

On behalf of each Petitioner the following motions and or exceptions were denied which raises the federal constitutional questions presented herein.

I. As to Petitioners Joseph M. Palladino and Francis X. Rausch:

a) Defense counsel in Cases No. 34329, 34330, 34983, 34984, 35272, and 35273, filed a Consolidated Motion to Dismiss stating:

> "Now comes Joseph N. Paladino (sic). . . and Francis X. Rausch, Defendants in the above entitled case (sic) and move this Court to dismiss the complaints against them for the reason that the books which are the subject matter of the complaint are not obscene as a matter of law and thus protected expression under the First and Fourteenth Amendments to the Constitution of the United States."

A Memorandum of Authorities was filed in support of the Defendants' Consolidated Motion to Dismiss. His Honor, Judge Beaudreau, took the Motion under advisement, filed on April 16, 1968, prior to the receipt of evidence, and on April 26, 1968, denied the Motion. (See the Consolidated Summary of Record and Assignment of Errors, Pages 39 and 40.)

b) Defense counsel for Petitioners Palladino and Rausch thereupon made a due and timely request for rulings by the Court presenting federal questions as follows:

> "First Requested Ruling. Each of the magazines involved in the referenced cases are not obscene as a matter of law and are protected expression under the First and Fourteenth Amendments to the Constitution of the United States and Article 16, Part 1 of the Constitution of the Commonwealth of Massachusetts.
>
> "Second Requested Ruling. Section 28A, Chapter 272 of the General Laws of the Commonwealth of Massachusetts, as amended by Chapter 492, Section 2 (1959 statutes) is unconstitutional as written in that it does not require that a Defendant be charged with knowledge of the obscene character of the enumerated categories of objects set out in said Act.

"Third Requested Ruling. Section 28A, Chapter 272 of the General Laws of Massachusetts as amended, is unconstitutional as written in that it is vague and indefinite with respect to the standards to be applied in criminal prosecutions under this section by use of the words 'obscene, indecent or impure'.

"Fifth Requested Ruling. That the complaints in the cases at bar are defective in that they do not charge that Defendants engaged in the alleged criminal speech 'knowing it to be obscene, indecent or impure'.

"Sixth Requested Ruling. The Commonwealth failed to establish a *prima facie* case against each of the Defendants in each of the cases referenced."

Judge Beaudreau on April 26, 1968, denied each of the requested rulings. (See Pages 41 and 42 of the Consolidated Summary of Record and Assignment of Errors.)

c) At the conclusion of the trial and the receipt of all evidence and the denial of the request for rulings, a Motion for Acquittal, treated by the Court as a Motion for Finding of Not Guilty, was filed on behalf of Petitioners Palladino and Rausch in the following language:

"Now comes the Defendant in the above entitled and numbered cases and moves the Court to order a finding of not guilty in said cases."

The motion as aforesaid was denied by Judge Beaudreau on April 26, 1968, as to these Petitioners. (See Pages 40 and 139 of the Consolidated Summary of Record and Assignment of Errors.)

d) The federal constitutional questions were preserved for review by the Supreme Judicial Court of the Commonwealth of Massachusetts on behalf of Petitioner Palladino by assignments of error in accordance with G.L. Ch. 278, Sec. 33(d) as follows:

> "Assignment of Error No. 1. The Trial Court erred in denying the defendant's Motion for Directed Verdict because complaint sets forth no crime known to the law in that it fails to charge an essential element of the crime, to wit: 'scienter' in the prosecution under Chapter 272, Section 28A of the laws of the Commonwealth. The failure of the complaints to charge 'scienter' was in violation of the defendant's rights under the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States."

> "Assignment of Error No. 5. The Trial Court erred in not granting the defendant's Motion to Dismiss for the reasons that the magazines which are the subject matter of the complaints are not obscene as a matter of law, and thus protected expression under the First and Fourteenth Amendments to the Constitution of the United States."

> "Assignment of Error No. 6. The Trial Court erred in not granting the Defendant's Motion for Directed Verdict for the reasons that the complaint set forth no crime known to law and there was no evidence presented by the prosecution to warrant findings of guilty on these complaints and because the Commonwealth has failed to meet the burden of proof (beyond a reasonable doubt) required by the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, namely: (a) The Commonwealth has failed to prove that the

dominant theme of the magazines which are the subject matter of the complaints appeals to a prurient interest in sex. (b) The Commonwealth has failed to prove that the magazines which are the subject matter of the complaints are patently offensive under national community standards. (c) The Commonwealth has failed to prove that the magazines which are the subject matter of the complaints are utterly lacking in any social value, all possible uses considered."

"Assignment of Error No. 7. The Trial Court erred in failing to grant defendant's First Requested Ruling, to wit: Each of the magazines involved in the referenced cases are not obscene as a matter of law and are protected expression under the First and Fourteenth Amendments to the Consitution of the United States and Article 16, Part 1, of the Constitution of the Commonwealth of Massachusetts."

"Assignment of Error No. 8. The Trial Court erred in failing to grant defendant's Second Requested Ruling, to wit: Section 28A, Chapter 272 of the General Laws of the Commonwealth of Massachusetts, as amended by Chapter 492, Section 2 (1959 Statutes) is unconstitutional as written in that it does not require that a defendant be charged with knowledge of the obscene character of the enumefated categories of objects set out in said Act."

"Assignment of Error No. 9. The Trial Court erred in failing to grant defendant's Third Requested Ruling, to wit: Section 28A, Chapter 272 of the General Laws of Massachusetts, as amended, is unconstitutional as written in that it is vague and indefinite with respect to the standards to be applied in criminal prosecutions under this section by the use of the words, 'obscene, indecent or impure'."

"Assignment of Error No. 12. The Trial Court erred in failing to grant defendant's Sixth Requested

Ruling, to wit: The Commonwealth failed to establish a prima facia (sic) case against each of the defendants in each of the cases referenced."

(See Pages 43 through 46 inclusive of the Consolidated Summary of Record and Assignment of Errors.)

e) The federal constitutional questions were preserved for review by the Supreme Judicial Court of the Commonwealth of Massachusetts on behalf of Petitioner Rausch by assignments of error, in accordance with G.L. Ch. 278, Sec. 33 (d) as follows:

"Assignment of Error No. 1. The Trial Court erred in denying the defendant's motion for Directed Verdict because complaint sets forth no crime known to the law in that it fails to charge an essential element of the crime, to wit: 'scienter' in the prosecution under Chapter 272, Section 28A of the laws of the Commonwealth. The failure of the complaint to charge 'scienter' was in violation of the Defendants' rights under the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States."

"Assignment of Error No. 2. The Trial Court erred in not granting the defendant's Motion to Dismiss for the reasons that the magazines which are the subject matter of the complaint are not obscene as a matter of law, and thus protected expression under the First and Fourteenth Amendments to the Constitution of the United States."

"Assignment of Error No. 3. The Trial Court erred in not granting the Defendant's Motion for Directed Verdict for the reasons that the complaint set forth no crime known to law and there was no evidence presented by the prosecution to warrant findings of guilty on this complaint and because the

Commonwealth has failed to meet the burden of proof (beyond a reasonable doubt) required by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, namely: (a) The Commonwealth has failed to prove that the dominant theme of the magazines which are the subject matter of the complaint appeals to a prurient interest in sex. (b) The Commonwealth has failed to prove that the magazines which are the subject matter of the complaint are patently offensive under national community standards. (c) The Commonwealth has failed to prove that the magazines which are the subject matter of the complaints are utterly lacking in any social value, all possible uses considered."

"Assignnent of Error No. 4. The Trial Court erred in failing to grant defendant's First Requested Ruling, to wit: Each of the magazines involved in the referenced cases are not obscene as a matter of law and are protected expression under the First and Fourteenth Amendments to the Constitution of the United States and Article 16, Part 1 of the Constitution of the Commonwealth of Massachusetts."

"Assignment of Error No. 5. The Trial Court erred in failing to grant defendant's Second Requested Ruling, to wit: Section 28A, Chapter 272 of the General Laws of the Commonwealth of Massachusetts, as amended by Chapter 492, Section 2 (1959 statutes) is unconstitutional as written in that it does not require that a defendant be charged with knowledge of the obscene character of the enumerated categories of objects set out in said act."

"Assignment of Error No. 6. The Trial Court erred in failing to grant defendant's Third Requested Ruling, to wit: Section 28A, Chapter 272 of the General Laws of Massachusetts, as amended, is unconstitutional as written in that it is vague and indefinite with respect to the standards to be applied

in criminal prosecutions under this section by the use of the words, 'obscene, indecent or impure'."

"Assignment of Error No. 8. The Trial Court erred in failing to grant defendant's Fifth Requested Ruling, to wit: That the complaints in the cases at bar are defective in that they do not charge that defendant engaged in the alleged criminal speech 'knowing it to be obscene, indecent or impure'."

"Assignment of Error No. 9. The Trial Court erred in failing to grant defendant's Sixth Requested Ruling, to wit: The Commonwealth failed to establish a prima facia (sic) case against each of the defendants in each of the cases referenced."

(See Pages 139 through 142 inclusive of the Consolidated Summary of Record and Assignment of Errors.)

II. As to Petitioners Charles Johnson, Leo Marangi, John L. Hunt, Robert W. Osmond, Alfred Stanley Hughes, James H. Hunt:

a) Defense counsel in Cases No. 34073, 34074, 34142, 34143, 34590, 34591, 34593, 34594, 34681, 34682, 34832, 34833, 34926, 34927, 34928, 34929, filed a Consolidated Motion to Dismiss stating:

"Now comes the Defendants in the above-captioned matter and moves to dismiss the indictments (sic) on the ground that there has been no prior determination that the matter in controversy is obscene within the meaning of G.L.C. 272 S. 28A in violation of the Constitutions of the U.S. and Mass."

Judge Beaudreau denied the Motion to Dismiss on April 25, 1968. (See Page 8 of the Consolidated Summary of Record and Assignment of Errors.)

b) Defense counsel filed requests for rulings and findings urging, among other things, that the court find "the publication or material in controversy is [as] a matter of law not obscene" and "that upon all of the evidence the Defendant is entitled to a finding of not guilty." These exceptions were denied on April 25, 1968, by Judge Beaudreau. (See Consolidated Summary of Record and Assignment of Errors, Pages 8, 9, 53, 54, 66, 67, 81 and 82.)

c) Defense counsel thereupon filed a written Motion for Directed Verdict on behalf of the Petitioners in the following language:

> "Now comes the Defendant in the above-captioned matter and on the facts, the evidence and the law respectfully moves for directed verdict."

The Motion was denied by Judge Beaudreau on April 25, 1968, as to each. (See Consolidated Summary of Record and Assignment of Errors, Pages 10, 26, 54, 68, 82, and 108.)

d) On appeal, defense counsel preserved the federal constitutional questions for review by the Supreme Judicial Court of the Commonwealth of Massachusetts by their Consolidated Assignment of Errors as follows:

> "The trial court erred: ... (4) by denying the Defendants' Motions for Directed Verdicts. The Motions for Directed Verdicts, though inappropriately named, were treated as requests for findings of not

guilty by the trial judge. There was insufficient evidence as a matter of law to warrant a finding that each of the magazines involved was obscene, as defined by law, and that the individual defendants had sufficient knowledge of the contents of the magazines involved in their respective cases to establish scienter."

"(5) By denying the Defendants' following Requests for Rulings: . . 5. The publication or material in controversy is as a matter of law not obscene."

(See Pages 10 through 12 inclusive of the Consolidated Summary of Record and Assignment of Errors.)

The cases were consolidated on the appeal under No. S. 14,271 and argued on April 7, 1969, before the Supreme Judicial Court of the Commonwealth of Massachusetts. The Court returned a rescript which was filed on or about May 2, 1969, (Appendix A). The Petition for Rehearing set out the following as the basis in support of the request for rehearing:

a) The Court omitted to accord proper weight to the trend of national decisions in the absence of statutory and judicial precedent in this Commonwealth in deciding the primary questions of Constitutional Law raised in Appellants' Consolidated brief.

b) Procedural and substantive Due Process rights of the Appellants named herein further requires a rehearing in that the ruling in the present case directly conflicts with the decision of the Supreme Court of the United States in *Stanley v. State of Georgia*, 22 L.Ed.2d 542, decided April 7, 1969, after the filing of Appellants' Consolidated Brief and its applicability to Appellants' appeals was not, therefore, argued before the Supreme Judicial Court for the Commonwealth.

c) The Court by its Rescript Order failed to give a brief statement of the grounds and reasons for its decision in affirming the rulings of the Superior Court for Suffolk County as is required by Massachusetts General Laws, C.211, Sections 8 and 9, and the failure to do so is prejudicial to Appellants' rights to procedural and substantive Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

The relief prayed was:

> "WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of convictions against Appellants in the Superior Court of Suffolk County sitting in Boston be, upon further consideration, reversed."

The Supreme Judicial Court for the Commonwealth of Massachusetts by letter dated May 12, 1969, denied the Petition for Rehearing (Appendix B).

Reasons for Granting the Writ.

1. The magazines involved in the prosecutions herein are not obscene in the constitutional sense and are protected expression under the First and Fourteenth Amendments to the Constitution of the United States. The judgments of conviction against Petitioners under Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A as amended, based upon sale or possession of the aforesaid magazines results in an unconstitutional application of said statute, contrary to the express guarantees of the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution.

There was no evidence adduced by the prosecution, to prove that these magazines, or any of them, appealed to a prurient interest in sex, substantially exceeded the level of candor tolerated by the national community, or any community, in the presentation of sex or nudity, and were devoid of social value. The magazines herein are quite comparable, and in some instances the exact magazines found not to be obscene in the constitutional sense either by the Supreme Court of the United States, the inferior federal courts, or various state appellate courts.

This Court in *Roth v. United States*, 354 U.S. 476, at 488 stated:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

At this point in the opinion a footnote, no. 23, directs us back to footnote no. 14 of the opinion.

Footnote no. 14 follows these words by the Court:

> "All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests.*" (Emphasis supplied)

The footnote no. 14, referenced in *Roth*, cites among others, the case of *Breard v. Alexandria*, 341 U.S. 622.

The *Breard* case involving the construction of an ordinance was held *inter alia* as applied to solicitors of magazine subscriptions, not to unconstitutionally abridge freedom of speech and press.

The opinion of the Court, addressing itself to the exercise of First Amendment rights of Petitioners therein stated:

> "The First and Fourteenth Amendments have never been treated as absolutes. *Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses.* Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life. (Emphasis supplied.)

This Court in a per curiam opinion in *Redrup v. State of New York*, 386 U.S. 767, appeared to delineate what may have been meant in *Roth* and *Breard* about "encroachment" upon rights of others, which may be significant in determining whether material alleged to be obscene is without the ambit of the First Amendment, when it was stated:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. . . . In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. *Cf. Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463."

In the *Pollak* case, it would appear that this Court did not find any "encroachment" on the rights of two individuals as passengers on D.C. Transit buses, in the exercise of their First Amendment rights to communicate in public places, when considered in light of the finding of the Public Utilities Commission that the radio broadcasts in the buses were in the interest of the general public.

Thus in *Pollak*, the "encroachment" when adjusted to the rights of others did not "compel a finding by the Court that the radio program interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places", of the majority.

This Court after its per curiam opinion in *Redrup v. New York, supra,* granted Certiorari and/or review in more than twenty (20) cases coming before the Court, and summarily reversed the findings of obscenity.[1]

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[1] *Austin v. Kentucky*, 386 U.S. 767 (magazines entitled "Spree", No. 38, and "High Heels", Vol. 2, No. 6); *Gent v. Arkansas*, 386 U.S. 767 (magazines entitled "Gent", "Swank", "Bachelor", "Ace", "Cavalcade", "Gentleman" and "Sir"); *Rosenbloom v. Virginia*, 388 U.S. 450, ("Solis", a magazine printed in German, and also 207 other nudist magazines); *Ratner v. California*, 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (motion picture films "Jane Palmer No. 2", "M. Jordan" and "Jayne Tracy"); *Schackman v. California*, 388 U.S. 454 (girlie pictures in coin operated peep shows: D-15, O-12, O-7, B-1 and B-19); *Central Magazine Sales, Ltd. v. United States*, 88 S. Ct. 235 (girlie magazine "Exclusive", and nudist magazines "International Nudist Sun", No. 16, and "Review International", No. 6); *Potomac News Co. v. United States*, 88 S. Ct. 233 (male nudist magazine "Hellenic Sun Number Two"); *Connor v. City of Hammond*, 88 S. Ct. 234 ("girlie" magazines); and *Chance v. California*, 88 S.Ct. 253 (nude pictures).

See also: *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Henry v. State of Louisiana*, 20 L. ed 1343 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Quantity of Books v. Kansas*, 388 U.S. 452 (1967).

The Court in *Ginsberg v. State of New York*, 20 L. Ed. 2d 195, in holding a state statute in question as reflecting "a specific and limited state concern for juveniles." *Redrup v. New York, supra*, went on to state:

> "The 'girlie' picture magazines involved in the sales here are not obscene for adults."

A footnote no. 3 at this point states in part:

> "other cases which turned on findings of nonobscenity of this type of magazines include *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50, *Conner v. City of Hammond*, 389 U.S. 48; *Potomac News Co. v. United States*, 389 U.S. 47, . . . ".

The "girlie" magazine involved in the case of *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50, was described by the Circuit Court of Appeals in 373 F.2d 633, at page 634 as follows:

> "We agree, also, that *Exclusive* is obscene.
>
> "*Exclusive* is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the model's wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide." (Emphasis supplied)

> "We agree with the District Court that these apparently unretouched pictures of young women, posed as they are, are patently offensive and that the magazine *Exclusive* is obscene."

The decision of the Circuit Court of Appeals was appealed on a petition for a writ of certiorari to the Supreme Court of the United States on October 23, 1967, in 389 U.S. 50. The court reported out as follows:

> "Per Curiam. The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Fourth Circuit is reversed. *Redrup v. New York*, 286 U.S. 767." (389 U.S. 50.)

The various inferior Federal Courts and state appeals courts, in viewing *Redrup v. New York, supra* as the same has been apparently historically applied by the Supreme Court of the United States, have held to the "juveniles", "encroachment" and "Ginzburg pandering" standards for determining criminal conduct and/or obscenity of the publications before the various Courts, sufficient to remove the protection afforded the interested adult public in their exercise of constitutionally protected freedom of press and speech.

In an en banc per curiam decision joined in by all five (5) members of the United States District Court for the District of Maryland, *United States v. 4,400 copies of Magazines, Including 200 copies each of Magazines Entitled Cover Girl Nos. 6,7,8,9,10,11,12,13,14,15 and 16; and Exciting Nos. 6,7,8,9,10,11,12,13,14,15 and 16*, reported in 276 F. Supp. 902 (December 21, 1967) it was stated in pertinent part:

"It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.

* * * * * * * *

"... this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States*, 383 U.S. 463, at 465-466, they would not be entitled to the protection of the First Amendment."

Several of the exact publications involved in the Petition presented to this Court herein, are those determined not to be obscene in the constitutional sense by that Federal Court, and comparable to those found not to be obscene in the Constitutional sense by other inferior Federal Courts and state appellate courts. (The United States District Court for the Central District of California in a case styled *U.S.A. v. 650 Pieces, More or Less*, entered 9/27/68, approved a stipulation for dismissal with prejudice and order thereon involving thirteen of the issues of the magazines, *Cover Girl* and *Exciting*, the subject of the case of *U.S. v. 4,400 Copies of Magazines, supra* (Appendix E).)

U.S. Circuit Courts of Appeal

1. *Grant v. U.S.*, 380 F.2d 748 (CA-9 - 1967):

"This appeal involves an appeal on convictions for using the mail to sell and distribute a collection of rotten books

alleged to be obscene. We characterize the books as obsessed with sex. If they have any literary merit it is obscure. At best they are junk."

The Court went on to state:

"But under the First Amendment decisions that have piled up there does not seem to have been the leer accompanying them required by *Ginzburg v. U.S., supra*, to uphold the convictions. The books in this case are obviously about the same as dealt with in *Redrup v. New York, supra*."

2. *Culbertson v. State of California*, 385 F.2d 209, 1967 (CA-9):

"We have examined the photographs in question. Each depicts four scantily clad women whose poses might be provocative to some. The pictures are not artistic but we are thoroughly convinced that they are not 'hard core' pornography and that they do not in their expression go 'substantially beyond customary limits of candor.' See *Redrup v. New York, supra*."

3. In *Luros v. U.S.*, 389 F.2d 200 (CA-8, 1968) the Court, discussing *Redrup*, agreed with the finding of the trial court dismissing all counts relating to girlie magazines by reference in a footnote as follows:

> "(6) The trial court dismissed all of the counts relating to a third class of magazines consisting of pictures of scantily clad and nude models generally posed in suggestive and provocative poses (called girlie magazines). Although described as sexually provocative these are generally not within the

proscription of the statute (obscenity). *Manual Enterprises v. Day*, 370 U.S. 478 (1962), *Redrup v. New York, supra.*"

Federal District Courts

1. *U.S. v. 4,400 Copies of Magazines Entitled Cover Girl and Exciting, supra.*

2. *U.S. v. 127,295 Copies of Magazines, etc.*, not reported, Civil No. 20078, USDC-Md. 1968, wherein the Court stated:

"The magazines involved in the present case are lewder than any magazines heretofore considered by this Court, including the magazine "Exclusive" and the magazines involved in *United States v. 4,400 Copies of Magazines, supra.* The magazines in the present importation appeal more blantantly to the prurient interest of the average man or boy, and go further beyond the prevailing standards of candor. They have no social value. They are clearly obscene in the ordinary sense of the word. This Court has no doubt that they would be considered obscene by almost any jury and by almost any judge not bound by the present interpretation of the First Amendment by the Supreme Court. In a few of the magazines Lesbian activities are suggested, but none of them contains any pictures of sexual intercourse.

"It is incredible that those who adopted the First Amendment intended that it should license purveyors of filth to flood the country with the kind of material now held protected. But the duty of the inferior federal courts is to apply, as best we can, the standards the Supreme Court has decreed with respect to obscenity. The task is difficult because to us, as to most judges, the test which must be applied here, like the Peace of God, passeth all understanding. . . It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods

by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment. . . .

"Nevertheless, since the magazines involved in the present case have not yet been admitted into the United States, we cannot be sure how they will be marketed – (a) whether they will be sold to juveniles, either by mail solicitation or over the counter, (b) whether they will be offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, and (c) whether they will be offered for sale in a manner which will amount to pandering.

"This Court is, therefore, of the opinion that it cannot order the condemnation and forfeiture of these magazines at this time. On the other hand, this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States*, 383 U.S. 463, at 465-466, 467, 470-471, 474-476, 86 S. Ct. 942, 16 L.Ed. 2d 31, they would not be entitled to the protectio of the First Amendment."

3. *U.S. v. 3 Packages of Magazines*, USDC, Central District of California, Civil No. 68–25-F, February 20, 1968.

U.S. v. 80 Cartons, USDC, Central District of California, Civil No. 68-480-IH, filed April 30, 1968.

Most of the magazines in this case found not to be obscene as a matter of law by the two different U.S. District Court Judges in California, were involved in the case of *U.S. v. 127,295 Magazines, supra.*

4. *Poulos v. Rucker*, 288 F.Supp. 305 (USDC Ala. - 1968). The court in this case stated:

> "In cases where the sole issue is obscenity *vel non*, *Redrup v. State of New York, supra*, states the controlling legal principles. After outlining the diverse views of the individual Justices the Court held that 'whichever of these constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand.'
>
> "One month after *Redrup* the Court reversed *per curiam* 13 state and federal court judgments finding material obscene without waiting for briefs and argument. The Court simply granted certiorari and reversed, citing *Redrup*. This court interprets these decisions as indicating that it is indeed a rare book that solely on the basis of its content is not entitled to constitutional protection."

Whereupon, the court declared the publications entitled "Gay A-Go-Go", "Dolls A-Go-Go", "Lesbiana" and "Seize" not to be obscene in the constitutional sense.

State Appellate Court Decisions

1. *People of the State of California v. Noroff*, 433 P.2d 479 (1967):

"Given the materials to which the Supreme Court has accorded constitutional protection, we cannot withhold such

protection here. Accordingly, we must sustain the trial court's ruling that the magazine is not obscene.

"The United States Supreme Court has wisely recognized that ultimately the public taste must determine that which is offensive to it and that which is not; a public taste that is sophisticated and mature will reject the offensive and the dull; it will in its own good sense discard the tawrdy, and once having done so, the tawdry will disappear because its production and distribution will not be profitable. Understandably, such maturity does not come quickly or easily, and, in a time when the strictures of Victorianism have been replaced by wide swings of extremism, it seems hopelessly remote.

"Yet this court is bound, of course, by the decisions of the United States Supreme Court. That court has imposed its prohibitions only at the outer limits of the area of publication, leaving to the public the task of voluntarily casting out the offensive. That court has held that the representation of the nude human form in a non-sexual context is not obscene. The Supreme Court has decided that the judiciary cannot engage in the task of placing legal fig leaves upon variegated presentations of the human figure. That court has told us that no matter how ugly or repulsive the presentation, we are not to hold nudity, absent a sexual activity, to be obscene. In the materials before us we find some of the poses of the subjects to be inexcusably repulsive, and we trust that a discerning public will discard and reject them. But the decisions of the United States Supreme Court tell us that the task of rejection lies not with us but with the public."

2. *In Re Larry D. Panchot*, 73 Cal. Rptr., 689 1968:

"The substantial activity condemned in this case consisted of selling four packets of photographs depicting nude females posing singly. In these crude photographs the subjects assume various poses which emphasize various parts of the body. None of the poses, however, depicts any form of sexual activity."

A footnote here states:

"Graphic depiction of sexual activity is the distinguishing feature of the only materials which the Supreme Court of the United States has ever ruled to be obscene."

3. *People of the State of California v. Rosakos*, 74 Cal. Rptr. 34:

"The pictures depicted a semi-nude female posing in such a manner as to show her breasts and vaginal area. These pictures would seem to be quite similar to those described in *People v. Noroff, supra,* where the Court says, 'The publication admittedly makes no effort to conceal either male or female genitals and several of the poses seem contrived to preserve genital exposure at the expense of esthetic considerations. . . . having thus found that the pictures in question are not obscene per se can they be made so by the seller's 'pitch' and 'come-on' . . . we hold they cannot. The seller's statement certainly cannot make that which is not obscene, obscene."

4. *People of the State of Michigan v. Zerilli*, 165 N.W. 2d 619 (1968):

"The publications that were purchased by police officers from the defendant at his Tip Top Book Store were typical so called 'girlie' and 'nudist' magazines. We are satisfied that the seized publications are the same type held not to be 'obscene in the constitutional sense' in *Redrup v. New York, supra*, and in the cases collected in *Footnote 3* of *Ginzberg v. New York*, 390 U.S. 629.

"No claim has been made that the statute in question reflects a specific and limited state concern for juveniles, nor is there any suggestion of assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, nor is there evidence of the sort of pandering which the court found significant in *Ginzburg v. United States, supra*."

5. *Olsen v. Doerfler*, 165 N.W. Rptr. 2d 648 (1968):

"Defendants ultimately urge us to re-examine the actual magazines involved in this action and to declare that they are constitutionally protected. They base this contention on the case of *Redrup v. New York, supra*. Support for their position is found in a flat statement taken from *Ginzberg v. New York, supra*, in the following words: 'The girlie picture magazines involved in the sales here are not obscene for adults, *Redrup v. State of New York*.' Indeed by mid summer 1968 the Supreme Court had reversed a dozen and more obscenity actions with per curiam opinions citing only *Redrup*. The best and most lucid interpretation of *Redrup*

that we have found appears in the case of *United States of America v. 4,400 Copies of Magazines, "Cover Girl" and "Exciting" etc*, 276 F.Supp. 902, decided December 21, 1967 in the United States District Court for the District of Maryland . . .we can only conclude from *Redrup* and its subsequent application by courts, federal and state, that the prosecution here under the *Redrup* doctrine was premature and cannot stand, absent the factors set forth in *Redrup* . . . in light of present United States Supreme Court decisions, how an effective prosecution for present limitation of the distribution of obscene materials is to be maintained we are at a loss to say. The law at least for today is expressed in *Redrup*. Suffice it to say that society, which generally manages to control that which the majority finds undesirable will never close up shop."

6. *G. P. Putnam's Sons v. Calissi*, 235 A.2d 893 (Supreme Court for the State of New Jersey - 1967).

"Under the standards enunciated by the United States Supreme Court it must be concluded that publishing, selling or distributing the book in question is protected from governmental suppression by the *First* and *Fourteenth Amendments. Redrup v. New York, supra.*"

7. *Commonwealth of Pennsylvania v. Dell Publications*, 233 A.2d 840 (1967).

In this case the Supreme Court of Pennsylvania discussed the impact of *Redrup New York*, stating:

> "On May 8, 1967, without the fanfare of its 1966 trilogy, the Court handed down a cryptic per curiam opinion disposing of three consolidated cases, *Redrup*

v. State of New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 515, which may yet prove to be the most significant of its obscenity opinions . . . *Redrup* seems to signify the Court's final abandonment of its futile search for a definition of obscenity *vel non*. For significantly, instead of attempting to determine what constituted obscenity, the Court approached the problem in terms of those circumstances under which the publication of otherwise unobjectionable material might be constitutionally restricted . . .

"As has already been indicated in this opinion, none of the three situations described in *Redrup* are present in the case at bar. The importance of *Redrup* to obscenity litigation in general, and to the instant case in particular, is amply demonstrated by eleven decisions handed down by the Court on the last day of the 1966 Term, June 12, 1967. In each case the Court granted certiorari and summarily reversed an obscenity conviction citing *Redrup* as its sole authority. In other words, none of the materials involved in these litigations was, in the Court's view, obscene in the constitutional sense."

8. *State of Ohio v. J. L. Marshall News Co.*, 232 N.E. 2d 435:

"The decision in *Redrup* makes it unnecessary for the Court to consider those issues since the Supreme Court in its opinion severely limited the definition of obscenity which could be made unlawful without unconstitutional interference with freedom of speech and of the press.

"*Redrup* holds that except under laws dealing specifically with juveniles, the state may not constitutionally proscribe any material other than hard core pornography as described by Mr. Justice Stewart in *Ginzberg*. The only exceptions would be where there is evidence that the defendant was

pandering – that is, making his principal business the exploiting or pushing of "obscenity" or where there was evidence of 'an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' Under such a test, any ordinary book or magazine seller, whether wholesale or retail, is constitutionally protected against prosecution for material, other than hard core pornography, carried in the usual course of business."

The determination of whether materials are constitutionally protected is a legal question and must be made by the Court based upon an examination of the material itself.

The United States Supreme Court in *Roth v. U.S.*, 354 U.S. 476 (1957) stated:

> "... the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

The New York Court of Appeals in *People v. Richmond County News*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 360, 175 N.E. 2d 681 (1962) stated:

> "... if an Appellate Court were to rely upon and be bound by the opinion of the trier of facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

The Supreme Court of the State of California in *Zeitlin v. Arnebergh*, 59 C.2d 901, 31 Cal. Rptr. 800, 383 P.2d 152 (1963) stated:

> "... they raise issues, not of ascertainment of historical fact but the definition of statutory proscription and constitutional protection; *the court itself must determine the law of the case* for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene." (59 C.2d at P. 908, 909, Emphasis supplied).

The opinion of the Supreme Court in *Jacobellis v. Ohio*, 378 U.S. 184 in discussing the issue of fact versus law judgment stated:

> "... we are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence'. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

Kingsley Int'l. Pictures Corp. v. Regents, 360 U.S. 684, 708, 3 L.ed 2d 1512, 1527, 79 S. Ct. 1262 (separate opinion):

> "It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final board

of censorship. But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process. . . "

Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 116 (1960):

"This obligation – to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts in the form of determinations of fact – appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised."

U.S. v. One Obscene Book entitled Married Love, 48 F.2d 821 (1931):

". . . this court must determine, as a matter of law in the first instance, whether the book alleged to be obscene falls in any sense within the definition of that word."

U.S.A. v. A Motion Picture Film Entitled, "I am Curious-Yellow", 404 F.2d 196 (November 26, 1968):

"However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the Court. . . ."

See also:

Manual Enterprises v. Day, 370 U.S. 478, 8 L.ed 2d 639 at page 647.

United States v. 4,400 copies of magazines, etc., 276 F. Supp. 902 (1967).

The Supreme Court recently handed down its decision in the case of *Stanley v. State of Georgia*, 22 L.ed. 2.d 542 (1969), and although initially limited to declaring unconstitutional all laws relating to private possession of gross, hard core pornography, it would appear to have far reaching implications to the legal questions pertinent in other alleged obscenity prosecutions. We suggest that the *Stanley* case reaffirms the concept espoused by Petitioners herein as to the meaning of *Redrup v. New York, supra*, and reiterates the narrow grounds on which the general commercial circulation of materials might be condemned, (i.e. ". . . public distribution of obscene materials. . . is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginzberg v. New York, supra*, or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York*, 386 U.S. 767, 769.") and confirms that, "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."

The Supreme Court in the *Stanley* case rejects the concept that exposure to obscenity leads to anti-social conduct by saying, "There appears to be little empirical basis for that assertion" (See footnote 9) and suggests that, "Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

In the absence of any state statute which reflects a specific and limited concern for juveniles, absent any evidence or suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; and absent evidence of the sort of pandering which the Supreme Court deemed significant in *Ginzburg v. U.S.*, 383 U.S. 463; then Petitioners under the rationale of *Redrup v. New York*, supra as the same has been historically applied, (See Footnote 1), should be accorded the protection of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

In the case before the Massachusetts Court on behalf of Petitioners, there was no evidence constitutionally relevant which offends the suggested rationale in *Redrup* and *Stanley* for excluding the magazines at bar from the protection of the First Amendment. Nor was there any relevant evidence affirmatively adduced by the prosecution as would show that the magazines, or any of them, had the requisite prurient appeal, exceeded the limits of candor tolerated in the national community, and was without redemptive social value. See: *In Re Giannini, et al.* 72 Cal. Rptr. 655 (1968).

Accordingly, in view of the record herein and the decisions of this Court, as relied upon by Petitioners, it is submitted that the judgments of conviction rendered herein by the Commonwealth of Massachusetts cannot stand in the light of the protective provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended by Chapter 492, Section 2 (1959 statutes) is repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States because of its failure, as written, by its terms to require scienter as an element of the offense; and hence an abridgment of Petitioners' rights to freedom of speech and press and Due Process under the said provisions of the Constitution.

The constitutional construction placed by the Supreme Judicial Court of the Commonwealth of Massachusetts, on Section 28A by its decision in the case of *Demetropolos v. Commonwealth*, 342 Mass. 658 (1961) is clearly in substantial error.

The Massachusetts obscenity statute, Section 28A, does not contain any language relating to scienter. In the *Demetropolos* case the Court held that it would construct Section 28A of the General Laws, Chapter 272, as if it contained the words, "knowing it to be obscene, indecent or impure."

The Court in arriving at that decision stated, "... that where a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation" and hence that Court made what it considered to be a constitutional construction. It was argued in that case that General Laws, Chapter 272, Section 28B which relates to "Sale, etc." of obscene books does in fact contain the phrase, "knowing it to be obscene, indecent or impure." The Massachusetts Court did go on to

say that the difference between the two provisions of the statute might be persuasive in the ordinary case but did not accord the difference as being of constitutional dimensions.

The Supreme Court of the United States in *Smith v. California*, 361 U.S. 147 at page 151 states:

> "... the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecutions... and this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech..."

The opinion of the United States Supreme Court by these words casts a substantial doubt on the construction that the Massachusetts Courts subsequently placed on Section 28A, Chapter 272 of the General Laws of Massachusetts vis-a-vis *Demetropolos v. Commonwealth, supra.*

Several state courts had an opportunity, within the years immediately after the decision of the United States Supreme Court in *Smith v. California, supra*, to declare and rule on the constitutionality of legislation aimed at obscene matter that did not statutorily require "knowledge" on the part of the seller. Several of these which are deemed to be particularly important include:

In *State v. Kuebel*, 171 N.E. 2d 45 (Supreme Court of Indiana - 1961) wherein it was stated:

"While we recognize that an act of the legislature will be upheld if reasonably possible, yet, this rule does not require or authorize the court to amend a statute by judicial decree in order to sustain its validity... the offense defined in the statute here in question consists solely of the sale or possession of certain articles found on Judicial investigation to be obscene, lewd, etc. as was the case in *Smith v. California, supra.* In our judgment the statutory definition of the criminal offense here, as was true in the *Smith* case, includes no element of 'scienter - knowledge of the book' and, as did the ordinance there, the statute here imposes a strict or absolute criminal liability... if the Los Angeles ordinance is invalid because it tends seriously to restrict the freedom of speech and of the press, we are compelled to conclude that Section 10-2803, supra, also violates Section I of the Fourteenth Amendment to the Constitution of the United States for the same reasons. See *Smith v. California, supra; People of the State of New York v. Engel*, 1960, 7 N.Y. 2d 1002, 200 N.Y.S. 2d 48, 1686 N.E. 2d 845.

"Since the statute here, without making some requirement for scienter, i.e., knowledge of the contents of the books, periodicals, pamphlets, etc., for the possession of which appellee here is charged, makes it a criminal offense for any person to sell, offer to sell, or have in his possession, obscene matters particularly described in the statute, tends to restrict and inhibit the right of free speech and impose a restraint upon the interchange of thought and opinion, it is invalid..."

People of the State of Michigan v. Villano, 369 Mich. 428, 120 N.W. 2d 204 (Supreme Court of Michigan - 1963). In this case the Supreme Court of the State of Michigan struck down as being unconstitutional and invalid the provisions of the Penal Code relating to obscenity because they did not require that the act of possession of obscene

literature with intent to sell must be committed *knowingly* in order to be punishable. In this regard they stated:

> "The conclusion cannot be avoided that in the instant case the section of the Penal Code under which the prosecution was brought was invalid on the ground that it conflicted with the provisions of the Federal Constitution on which the decision in *Smith v. California, supra*, was based."

In the case of the *City of Cincinnati v. Marshall*, 172 Ohio St. 280, 175 N.E. 2d 178 (Supreme Court of Ohio - 1961) it was held in a *per curiam* opinion that the ordinance of the City of Cincinnati "attempts to impose an absolute criminal liability without reference to any knowledge on the part of the accused. This it cannot do. Such ordinance is invalid because it is in conflict with the First and Fourteenth Amendments of the United States Constitution. The *Smith* case is clearly controlling here and must be followed."

Curiously enough, this last case was cited by the Massachusetts Court with approval in the case of *Commonwealth v. Korey*, 351 Mass. 331 (1966).

In the case of *Ellenburg v. State of Tennessee*, 381 S.W. 2d 29 (1964), the Tennessee obscenity statute was declared unconstitutional by the Tennessee Supreme Court for failing to require scienter, and stated with respect to the third part of the statute which dealt with possession of materials containing prohibited obscenity in pertinent part:

> "On the point at issue here we think this statute is not ambiguous and is susceptible of only one interpretation. The element of scienter is simply not in this statute, either expressly or impliedly.

3. Even if the statute C.H. 272 G.L.S. 28A is by judicial construction interpreted as though it contained the element of scienter, then the said statute has been unconstitutionally applied by the Commonwealth in the prosecution of the cases at bar for failure to charge the element of scienter against each of the petitioners in the criminal complaints upon which said prosecutions were based.

Should this Court sustain the holding in *Demetropolos v. Commonwealth, supra*, by the Massachusetts Supreme Court, construing Chapter 272, Section 28A as requiring "scienter", then the failure of the Commonwealth to charge "scienter" as an element of the crime in the complaints renders Section 28A of the statute in its application to the cases herein to be repugnant to the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

It was stated in *United States v. Luros*, 253 F. Supp. 160 (1965), (reversed on other grounds in 389 F.2d 200, 1968) that:

> "An indictment is sufficient if it (1) alleges all of the elements of the offense, (2) fairly informs the defendant of that which they must be prepared to meet in the preparation of their defense, and (3) enables them to plead an acquittal or a conviction in bar of future prosecutions for the same offense. *Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *United States v. Debrow*, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953); *Stapleton v. United States*, 260 F.2d 415, 17 Alaska 713 (5th Cir. 1958); *United States v. Bagdasian*, 291 F.2d 163 (4th Cir. 1961). This indictment satisfies each of these requirements.

"An indictment that charges an offense in the words of the statute is sufficient if the words of the statute contain all the elements of the offense. *Babb v. United States*, 218 F.2d 538 (5th Cir. 1955); *United States v. Palmiotti*, 254 F.2d 491 (2nd Cir. 1958); *United States v. Foster*, 253 F.2d 457 (7th Cir. 1958)."

The Massachusetts Appellate Court in the *Demetropolos* case relied in part and/or cited with approval the case of *Cohen v. State*, Fla. 125 So. 2d 560. This case held in essence that the Florida state obscenity statute could be construed as though it contains the requirement of scienter, *Smith v. People of the State of California, supra*, however it was constitutionally required by the Florida Appellate Court that the Defendant be charged in an indictment or information with "knowledge" or "scienter" under any indictment or information initiated under the state obscenity statute.

In *Cohen v. State, supra*, it was stated:

"It follows from this construction of the subject statute that the information under which the appellant was charged was fatally defective for want of an averment that the appellant had sold and distributed the publication involved, knowing it to be obscene, lewd, etc. in character."

See also:

In *State v. Oman*, 121 N.W. 2d 616 (Minn. - 1963) it was stated:

"It is well established that the charge must fully, directly, and expressly, without uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. *Evans v. United States*, 153 U.S. 584, 14 S.Ct. 934, 38

L.Ed. 830. Although the statute in question read in the light of common law and of other statutes on like matter, may enable the court to infer intent of the legislature, this fact does not dispense with the necessity of alleging all of the facts necessary to bring the case within that intent. A statement of the eseential facts constituting the offense charged is indispensable to the validity of the indictment."

In *People v. Douglas*, 209 N.Y.S. 2d 734, 12 A.D. 2d 194 (1961) it was stated by the Supreme Court of New York, as follows:

"In further argument that the court should construe the statute as requiring scienter for conviction and thus uphold it where two constructions are possible, one of which will hold the act constitutional, he cites *People ex rel. Simon v. Bradley*, 207 N.Y. 592, 610-611, 101 N.E. 766, 772.

"We are therefore construing the statute to require scienter and hold that the Special County Judge was in error when he held the statute unconstitutional.

"It is our view, however, that the indictment is insufficient as it fails to allege knowledge on the part of the defendants. Having decided that scienter is an essential element of the crime it would seem that this element must be alleged in the indictment. The various counts of the indictment state that defendants sold obscene magazines. This is not a crime unless the magazines are sold with the knowledge, actual or constructive, that they were obscene. Such a defect would be jurisdictional."

People v. Villano, 369 Mich. 428, 120 N.W. 2d 204 (1963):

"It may be noted in this connection that the complaint, warrant, and information, in the instant case contained no allegation with reference to knowledge on the part of the defendant as to the character of the publications involved or the matter contained therein. If scienter was in fact an element of the offense under the statute as enacted in 1957, appropriate recognition of that fact should have been made in charging the offense."

Bennett v. State of Texas, 311 S.W. Rep. 2d 826 (1958):

"By motion to quash, the court's attention was directed to the failure of the information to charge the offense in the terms of the statute in that the word "knowingly" was omitted therefrom. . .where a statute denouncing an offense requires that the act be 'knowingly' done the indictment should also contain such allegation. . . Because the information does not charge an offense, the judgment is reversed and the prosecution ordered dismissed."

See also:

State v. Ross, 231 N.E. 2d 299 (Supreme Court of Ohio, 1967).

Thus, in various jurisdictions wherein the Appellate Courts have construed their respective obscenity statutes to embrace the element of scienter – as was done in the Commonwealth of Massachusetts in *Demetropolos, supra*, – the various state and federal courts require that an averment be contained in the criminal complaint that the accused had scienter or knowledge of the obscene character of the publications. The failure of the referenced complaints to charge scienter raise an error of constitutional dimensions requiring at the very least a remand to the lower courts where the Commonwealth should file amended complaints to correct

the defect. (This was the procedure employed in *Cohen v. State, supra,* at page 564.)

The failure of the Complaints as aforesaid to charge Appellants with "knowledge" represents an application of Section 28A, Chapter 272, Massachusetts General Laws by the Commonwealth repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

4. If the obscenity statute is judicially construed to contain the element of scienter and the criminal complaints on which the charges and prosecution are based may be judicially construed as though they contain the element of scienter, the convictions rendered in the absence of proof of scienter against Petitioners herein unconstitutionally abridge the Petitioners' freedom of speech and press and arbitrarily deprive persons including Petitioners of liberty and property without Due Process of law contrary to the Free Speech and Press and Due Process provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The Massachusetts Supreme Judicial Court in *Commonwealth v. Corey*, 351 Mass. 331 (1966) stated:

> "Absent the scienter requirement, booksellers, unable to familiarize themselves with all the material on their shelves, would tend to restrict sales to minors to the relatively few books of which they had some knowledge of the contents or character. The result would be an impediment to the sale to minors not only of unprotected matter but also of that which is constitutionally protected. To thus impede protected material is no more permissible under the variable

> than under the strict standard. See *Lockhart and McClure, supra*, at pages 103-114. '[W]here a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation.' *Demetropoios v. Commonwealth*, 342 Mass. 658, 660. We are of opinion that § 28 must be read as requiring scienter. Since proof of scienter was lacking, the judge erred in denying the defendant's motion for a not guilty finding."

Wherefore, judgment in that case was reversed and the finding set aside.

The record in this case does not support any finding of "scienter" in the proof adduced by the Commonwealth as to these Petitioners.

In the case of *People of the State of New York v. Seymour Grasberg*, 215 N.Y.S. 2d 1, 13 A.D. 2d 635 (1961), it was stated:

> "... scienter was a necessary element of the alleged crime, and there is no evidence tending to establish that the Appellant had knowledge of the presence of pornographic material, if any existed, in the magazines, or from which his knowledge of the contents may be inferred... the Appellant's guilt of the second, third and fourth counts of the information was not established beyond a reasonable doubt."

The failure to adduce proof of scienter as to Petitioners herein to support their convictions was a denial of rights accorded them under the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

In *Thompson v. Louisville*, 362 U.S. 199 (1960), this Court stated:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

See also:

Garner v. Louisiana 368 U.S. 157 (1961):

> "... it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

De Jonge v. Oregon 299 U.S. 353, 362. *Cole v. Arkansas*, 333 U.S. 196, 201. *Schware v. Board of Bar Examiners*, 353 U.S. 232.

The failure of the Commonwealth to prove scienter (guilty knowledge – *Morissette v. U.S.*, 342 U.S. 246) requires that this Honorable Court grant the Petition for Certiorari.

The convictions under the obscenity standard herein, as construed and applied to petitioners by the Supreme Judicial Court of the Commonwealth to justify convictions without the slightest proof of scienter; considering the record and authorities cited herein, violates the free speech and press and due process provisions of the First, Fifth, Sixth and Fourteenth Amendments. Under the governing standards elucidated in the opinions of this Court, the State manifestly

failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *Speiser v. Randall*, 357 U.S. 526; *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Schneiderman v. United States*, 320 U.S. 118; *Baumgartner v. United States*, 322 U.S. 665; *Hartzel v. United States* 322 U.S. 680; *Freedman v. Maryland*, 380 U.S. 51. See also, *Thompson v. Louisville*, 362 U.S. 199, 206, n.13.

To allow the convictions of Petitioners herein to stand and with it the view of the Supreme Judicial Court for the Commonwealth of Massachusetts that "there was no error in the trial and convictions of the defendants" (Appendix A) - nullifies the authoritative rulings of this Court to the contrary.

Conclusion.

It is respectfully submitted that the conviction of the petitioners violates their constitutionally protected rights of freedom of speech and press, and that the Commonwealth Court's judgment should be vacated. The denial of the petitioners' rights is tantamount to the denial of the same rights to others who have an interest in the unfettered distribution of their presumptively protected magazines, sold to adults only, under non-obtrusive circumstances, absent evidence of the sort of pandering deemed by this Court to be significant in *Ginzburg v. U.S.*, *supra*. For the foregoing

reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT EUGENE SMITH,
Alex. Brown & Sons Building,
Suite 507
102 W. Pennsylvania Ave.,
Towson, Maryland 21204,
Counsel for Petitioners.

JOHN A. PINO,
KEVIN M. KEATING,
Of Counsel.

August, 1969.

APPENDIX A.

Rescript Opinion, Supreme Judicial Court for the Commonwealth of Massachusetts, Case No. 14,271.

COMMONWEALTH v. CHARLES JOHNSON
(and seven companion cases[1]).

(Rescript Opinion)

There was no error in the trial and convictions of the defendants on the complaints under G. L. c.272, § 28A.

Judgments affirmed.

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[1]The defendants in the companion cases were Leo Marangi, Joseph M. Palladino, Sr., John L. Hunt, Robert W. Osmond, Alfred Stanley Hughes, Jr., James H. Hunt, Francis X. Rausch.

APPENDIX B.

**Letter dated May 12, 1969,
denying Petition for Rehearing.**

SUPREME JUDICIAL COURT
BOSTON 8, MASSACHUSETTS

RAYMOND S. WILKINS
CHIEF JUSTICE

May 12, 1969

Robert Eugene Smith, Esq.
Suite 507
The Alex. Brown & Sons Bldg.
102 W. Pennsylvania Avenue
Towson, Maryland 21204

Dear Sir:

Your request for rehearing in case No. 14,271, Commonwealth v. Johnson, has been considered by the full court and is denied.

Yours truly,

R. S. Wilkins

Chief Justice

cc: Theodore Glynn, Esq. Asst. Attorney Gen.
The Hon., Edward V. Keating.

APPENDIX C.

Constitution and Relevant Statutory Provisions of the Federal and Massachusetts laws.

Constitutional and Statutory Provisions Involved:

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law. . . abridging the freedom of speech, or of the press;. . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall. . . be deprived of life, liberty or property, without due process of law;. . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation;. . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Title 28 U.S.C.A., Section 1257, provides in part as follows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

6. The Massachusetts Obscenity Statute, Chap. 272. Section 28A as amended, provides:

> "§28A. Sale, etc., of Obscene Pamphlet, Phonographic Record, Picture, etc.
>
> Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. (Amended by 1959, 492, §2, approved and effective August 20, 1959.)

APPENDIX D.

**Complaint in the Superior Court
for the Transaction of Criminal Business,
County of Suffolk, Docket No. 34330.**

TO THE JUSTICES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said City of Boston for the transaction of criminal business, within the County of Suffolk, Edmond Griffin of the City of Boston, in the County of Suffolk, in behalf of the COMMONWEALTH OF MASSACHUSETTS, on oath complains that Joseph M. Palladino the elder of that name of said City of Boston, on the seventh day of February in the year of our Lord one thousand nine hundred and sixty-eight at the City of Boston aforesaid, and within the judicial district of said Court, did have in his possession a certain obscene, indecent, or impure printed magazine, for the purpose of sale, exhibition, loan or circulation, to wit, "Exciting", against the peace of said Commonwealth and the form of the statute in such case made and provided.

EDMUND GRIFFIN

SUFFOLK, TO WIT:

TAKEN AND SWORN TO, this eighth day of February in the year of our Lord one thousand nine hundred and sixty-eight.

BEFORE SAID COURT,

JOHN F. GREENE,
Assistant Clerk

A True Copy
Attest: DANIEL J. LYNCH, Clerk

APPENDIX E.

U.S.A. v. 650 Pieces, More or Less, of Obscene Magazines, United States District Court for the Central District of California, Civil No. 68-564-R.

FILED SEP 26, 1968
CLK. U.S. DIST. CT.

ENTERED SEP 27, 1968
CLK. U.S. DIST. CT.

UNITED STATES DISTRICT COURT

GENERAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

650 pieces, more or less, of OBSCENE MAGAZINES,
Defendants.

ZEPHYR PUBLICATIONS, INC.,
Claimant.

Civil No. 68-564-R

STIPULATION FOR DISMISSAL WITH PREJUDICE AND ORDER THEREON

IT IS HEREBY STIPULATED by and between the UNITED STATES OF AMERICA, plaintiff in the within action, through its counsel, WM. MATTHEW BYRNE, JR., United States Attorney, FREDERICK M. BROSIO, JR., Assistant U.S. Attorney, Chief, Civil Division, by LARRY L. DIER, and the Claimant in the within action, ZEPHYR

PUBLICATIONS, INC., through its counsel, ATKINS & JACOBSON, by BURTON C. JACOBSON, as follows:

I.

That the 650 pieces, more or less, are magazines bearing the titles "EXCITING" (Vol. Nos. 12, 13, 14, 15 and 16) and "COVER GIRL" (Vol. Nos. 6, 8, 10, 12, 13, 14, 15, and 16).

II.

That the Complaint for Forfeiture in the within action be, and the same is, hereby dismissed with prejudice by the plaintiff, the UNITED STATES OF AMERICA.

III.

That the seized articles be forthwith returned to Claimant or its authorized representative.

DATED: 25 September, 1968.

WM. MATTHEW BYRNE, JR.,
United States Attorney,

FREDERICK M. BROSIO, JR.,
Assistant U.S. Attorney,
Chief, Civil Division

By LARRY L. DIER
Attorneys for Plaintiff

ATKINS & JACOBSON

By BURTON C. JACOBSON,
Attorneys for Claimant.

ORDER

IT IS SO ORDERED this 26th day of September, 1968.

MANUAL L. REAL,
U. S. DISTRICT JUDGE

SUPREME COURT, U. S.

NOV 6 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 458

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, Sr.; JOHN L. HUNT;
ROBERT W. OSMOND;
ALFRED STANLEY HUGHES, Jr.;
JAMES H. HUNT; FRANCIS X. RAUSCH,
PETITIONERS,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. QUINN,
Attorney General.
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division.
LAWRENCE P. COHEN,
Deputy Assistant Attorney General.

GARRETT H. BYRNE,
District Attorney,
Suffolk County.

THEODORE A. GLYNN, JR.,
Assistant District Attorney,
Suffolk County.

Blanchard Press, Inc., Boston, Mass. — Law Printers

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The rescript opinion of the Massachusetts Supreme Judicial Court (Pet. App. A) is not yet reported.

Jurisdiction

The judgment of the Massachusetts Supreme Judicial Court was entered on May 2, 1969. A petition for rehearing was denied on May 12, 1969. The petition for a writ of certiorari was filed on August 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether, in the circumstances of this case, the failure to specifically allege *scienter* constitutes reversible error.

2. Whether, in the circumstances of this case, petitioners' convictions for selling, and possessing with intent to sell, obscene magazines is consistent with the First Amendment to the United States Constitution.

Statute Involved

Mass Gen. Laws, ch. 272, §28A, provides:

"§28A. Sale, etc., of Obscene Pamphlet, Phonographic Record, Picture, etc.

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction. (Amended by 1959, 492, §2, approved and effective August 20, 1959.)

Statement

Petitioner Charles Johnson was convicted in the Superior Court of Suffolk County[1] on three counts (Complaint Nos. 34073, 34862, 34929) of possessing obscene material with intent to sell, and on one count (Complaint No. 34074) of sale, in violation of Mass. Gen. Laws, ch. 272, §28A. Petitioner Leo Marangi was convicted on one count (Complaint No. 34143) of sale, and one count (Complaint No. 34143) of possession with intent to sell. Petitioner Joseph M. Palladino, Sr., was convicted on two counts (Complaint Nos. 34330, 35273) of sale. Petitioner John L. Hunt was convicted on three counts (Complaint Nos. 34591, 34832, 34833) of possession with intent to sell, and one count (Complaint No. 34590) of sale. Petitioner Robert W. Osmond was convicted on one count (Complaint No. 34593) of sale, and one count (Complaint No. 34594) of possession with intent to sell. Petitioner Alfred Stanley Hughes, Jr., was convicted on one count (Complaint No. 34681) of sale. Petitioner James H. Hunt was convicted on two counts (Complaint Nos. 34926, 34928) of possession with intent to sell, and one count (Complaint No. 34927) of sale. And petitioner Francis X. Rausch was convicted on one count (Complaint No. 34984) of sale. All petitioners were either imimprisoned for a period not exceeding nine months, or fined.[2] The Massachusetts Supreme Judicial Court affirmed the convictions.

The Commonwealth's evidence consisted primarily of the subject magazines introduced into evidence as exhibits, and other evidence and testimony connecting those magazines

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[1] All petitioners were first convicted in local district courts. Under the provisions of Mass. Gen. Laws, ch. 278, §18, all appealed and were granted a trial *de novo* in the Suffolk County Superior Court. All petitioners waived a jury trial in the Superior Court.

[2] The sentences are set forth at Pet. 10-11. Execution of all sentences has been stayed pending disposition by this Court.

with the various petitioners. We discuss below the nature of those exhibits together with the evidence showing sale or possession with intent to sell.

A. A magazine entitled "Exciting", Vol. #8, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page of this magazine shows a color photograph of a woman dressed in a sweater pulled above her breasts, and garter belt and stockings. Both the breasts and genital area are fully exposed. The remainder of the magazine contains photographs similar in nature to that on the cover page. In all but a few instances, the camera focuses upon and emphasizes the perineal area and vulva. An eight-photograph sequence shows a model disrobing from skirt and sweater to garter belt and stockings in a series of contortionistic poses obviously designed to emphasize the perineal area. Some photographs emphasize not only the perineal area and vulva, but the anus as well. The publisher states that the magazine is intended for serious minded artists who have difficulty in obtaining live models.

This magazine, the subject matter of Complaint Nos. 34142 and 34143 against petitioner Marangi, was purchased by a police officer from Marangi at the Back Bay Bookstore in Boston (J. Tr. 5-9).[3] The magazine was wrapped in cellophane and sealed, and sold at an advertised price of $5.00. While placed on the magazine rack, another label or tag attached to the cellophane wrapping covered the pubic area on the cover page photograph. Prior to completing the purchase, the police officer, peeling back the tag which covered the pubic area, asked petitioner Marangi if the photographs inside the magazine were simi-

[3] References are to the transcript of the trial of *Commonwealth* v. *Johnson, et al.* (J.Tr.), and *Commonwealth* v. *Palladino, et al.*, ("P.Tr.").

lar to that on the cover page. Marangi responded, "Yes, it is . . . It's even worse than that inside." (J.Tr. 8-9).

B. A magazine entitled "Exciting", Vol. #9, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page depicts a photograph of a woman with what appears to be a negligee draped over her left shoulder. She is also dressed in a garter belt, stockings, and boots. She is posed in a stance with her legs parted at an approximate angle of 45 to 50 degrees and her breasts and perineal area are fully exposed. The remainder of the magazine contains similar photographs, including an eight-photograph sequence in which a model disrobes from full dress to garter belt, stockings, boots, and a negligee covering her right arm and lower portion of her left arm. In all photographs, most of which are in color, the camera is focused upon either the breasts or perineal area with emphasis being on the latter through the photographic technique of framing the perineal area with a garter belt. The publisher states that the magazine is intended for artists having difficulty obtaining live models.

This magazine, the subject matter of Complaint Nos. 34073 and 34074 against petitioner Johnson, was purchased by a police officer from Johnson at the Book Nest in Boston. The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (J.Tr. 48). Before completing the purchase, the police officer asked Johnson if he had anything better, and Johnson responded that the magazine was "provocative enough." (J.Tr. 49). When asked what he meant by "provocative", Johnson stated that ". . . it meant to incite you or arouse you." (J.Tr. 49).

C. A magazine entitled "Cover Girl", Vol. [illegible]8, published by Nordisk Bladcentral A/S, P.O. Box 28[illegible] Copenhagen V, Denmark, copyright 1967. The cover page of this magazine contains a color photograph of a woman dressed

in a negligee which drapes her shoulders, a garter belt, and stockings. She is standing upright with breasts and perineal area in full view. The remainder of the magazine contains similar photographs, most of which are focused upon the breasts or perineal area. An eleven-photograph sequence shows the same girl photographed on the cover page disrobing from a dress to garter belt, stockings, and shoes, and posing in a series of contortionate poses designed to emphasize the perineal area and vulva. The publisher states that this magazine is intended for artists having difficulty finding live models.

This magazine is the subject matter of Complaint No. 35273 against petitioner Palladino, and Complaint No. 34984 against petitioner Rausch. With respect to Palladino, the evidence showed that on April 2, 1968, this magazine was purchased from the 200 Book Club in Boston (P. Tr. 93-97). The person who made the sale was Joseph Palladino, Jr. (P.Tr. 95). The 200 Book Club is owned by petitioner Palladino (P.Tr. 106). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (P. Tr. 94-95). Other evidence showed that signs stating "No persons under 21 admitted" and "Adults Only" were affixed to the outside of the 200 Book Club owned by petitioner Palladino (P.Tr. 10-11).

With respect to petitioner Rausch, the evidence showed that on March 23, 1968, the magazine was purchased by a police officer at the 200 Book Club in Boston (P.Tr. 64-65). In all other respects, the evidence was identical to that set forth above with respect to petitioner Palladino.

D. A magazine entitled "Cover Girl", Volume #9, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark, copyright 1967. The cover page shows a woman dressed in a negligee which hangs over her shoulders, gloves, garter belt, and stockings. She is standing upright, and both breasts and genital area are in plain

view of the camera. The remainder of the magazine contains similar photographs, with the camera focused either on the breasts, perineal area and/or vulva. Many of the photographs show women in contortionistic poses obviously designed to emphasize the perineal area and vulva. An eleven-photograph sequence shows a model disrobing from dress to garter belt and stockings. The last photograph of that sequence shows the model with a bathrobe draped over her shoulders with breasts fully exposed. Her legs are spread apart at an approximate angle of 45 degrees in order to emphasize the perineal area which is facing the camera. The publisher states that the magazine is intended for serious minded artists having difficulty finding live models.

This magazine, the subject matter of Complaint No. 34833 against petitioner John L. Hunt at the Cozey Book Store in Boston (J.Tr. 28-30). The magazine was wrapped in a sealed cellophane wrapper and placed on a rack. The entire cover page photograph was fully visible to any person who looked at the magazine on the rack (J.Tr. 30).

1. A magazine entitled "Cover Girl", Volume #12, published by SVEA Press AB, P. O. Box 17094, Stockholm 17. The cover page contains a photograph of a woman dressed in a sweater which is pulled above the breasts, and stockings. Both the breasts and perineal area are fully exposed. The remainder of the photographs in the magazine are of essentially the same nature, principal emphasis being placed upon the perineal area and vulva. The statement of the publisher, and what appears to be an article, are set forth in a foreign language.

This magazine, the subject matter of Complaint No. 34681 against petitioner Hughes, and Complaint No. 34682 against petitioner Johnson, was purchased from petitioner Hughes (J.Tr. 62-63). The magazine was encased in a sealed cellophane wrapper, and sold for an advertised

price of $5.00 (J.Tr. 63-65). A green tag or label covered the genital area of the woman depicted in the photograph of the cover page (J. Tr. 65). Petitioner Johnson stated to the purchasing police officers that he was the manager and in charge of the store (J.Tr. 69).

F. A magazine entitled "Cover Girl", Volume #14, published by Nordisk Bladcentral A/S, P.O. Box 288, Copenhagen V, Denmark. The cover page shows a woman dressed only in stockings and prehaps a garter belt. Her legs are spread to an approximate angle of 90 degrees in an obvious effort to focus upon and emphasize the fully exposed perineal area and vulva. The remaining photographs are of essentially the same order, principal emphasis being placed upon the perineal area, vulva, and in some instances, the anus. In some photographs, the pubic area appears to have been shaved in order to emphasize the exposed vulva. In other photographs, two models are shown lying in the same bed, with the camera focused upon the perineal area and vulva. The publisher states that the magazine is intended for serious minded artists who have difficulty finding live models. There are no articles in this magazine.

This magazine, the subject matter of Complaint Nos. 34593 and 34594 against petitioner Osmond, was purchased by a police officer from Osmond at the Book Store in Boston (J.Tr. 19-27). The magazine sold for an advertised price of $5.00, and was sealed in a cellophane wrapper, (J.Tr. 20, 21). Prior to making the purchase, the police officer asked Osmond if that magazine was the best that he had. Osmond reached down and displayed the same magazine which was not sealed in a cellophane wrapper. The officer then examined the magazine, and consummated the purchase (J.Tr. 21). A sign above the rack on which the magazine was placed warned "Adults Only" (J.Tr. 21-22).

G. A magazine entitled "Wonder Girl", Volume #1, distributed by Central Sales Limited, Box 42, Baltimore, Maryland. The cover page displays a photograph of a model dressed in stockings seated upon a motorcycle. The left breast and perineal area are fully exposed. The cover page states thereon "Adults Only". Except for the articles hereinafter discussed, the remainder of the magazine devotes itself to photographs similar to that on the cover page, with principal emphasis being placed upon the breasts, perineal area, and vulva. The magazine also contains four articles. The first, entitled "The World of Color", essentially points out that color photography is particularly appropriate for nude photography, and runs for one page. The second, entitled "Tips to Amateurs", is just that—giving short tips on nude photography—and runs for one and three-quarters pages. The third article, "Maids and Modesty", discusses the alleged decline of modesty and modern acceptance of nudity as part of the American culture. This article runs for one and three-quarters pages. The last article, "Artistic Values and Composition", discusses the problem of photo-composition, and urges all photographers to use imaginative studio backdrops so as to give an artistic approach to nude photography. All articles are fairly interspersed with photographs similar to that on the front cover. The magazine also contains several pages of advertisement, and is published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey, as, in the publisher's words, "an educational sociological publication equating the contemporary nude in color to artistic expression in a classic tradition."

This magazine was the subject matter of Complaint No. 34929 against petitioner Johnson and Complaint No. 34983 against petitioner Joseph Palladino, Sr. With respect to petitioner Johnson, the evidence showed that six of these

magazines were recovered from the Book Nest in Boston. (J.Tr. 72-73). The magazines were encased in a sealed cellophane wrapper, and sold for an advertised price of $5.00 (J.Tr. 73). A tag or label covered the genital area of the model on the cover page (J. Tr. 74). Petitioner Johnson was in charge of the Book Nest (J.Tr. 69).

With respect to petitioner Joseph Palladino, Sr., the evidence showed that on March 16, 1968, a police officer purchased the magazine from petitioner Palladino, Sr. (P. Tr. 51-54). The magazine was sealed in a cellophane wrapper, and sold for an advertised price of $5.00 (P. Tr. 53, 54). A label or tag covered the genital area of the model on the cover pages (P. Tr. 58). A sign on the outside of the bookstore prohibited minors from entering (P. Tr. 56-57).

H. A magazine entitled "Countess", publisher unidentified. The magazine is devoted exclusively to photographs of models in which breasts and/or perineal area are fully exposed. Indeed, in many photographs, the camera is focused upon the exposed vulva. There is no statement in the magazine as to the identity of the publisher or distributor.

This magazine, the subject matter of Complaint No. 34926 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston (J.Tr. 55-61). The magazine was encased in a cellophane wrapper, and, although advertised at a price of $4.00, sold for $3.00 (J.Tr. 56, 57).

I. A magazine entitled "Suzette", published by Sunshine Enterprises, Box 66, Mays Landing, New Jersey. The front cover shows a photograph of a model clothed in stockings and a garter belt. Breasts and genital area are fully exposed with emphasis being placed upon the genital area. "Adults Only" is written on the front cover. The remainder of the photographs in the magazine are of essentially the same order, with primary emphasis be-

ing placed upon the perineal area. Many of the photographs, most of which are in color, fully expose and focus upon the vulva. The magazine contains four articles. The first, entitled "Nudity and the Fourth Estate", reports on the alleged acceptance of nudity in the American community, and criticizes a Life Magazine article which is somewhat critical of the nudity fad. This article runs three pages long. The second article, "The Prudes v. Nudes", documents the history of "prudism", and concludes that the opposition to nudity today does not differ from the opposition of yesteryear. This article is two pages in length. The third, "The Whitman Sampler", contains an excerpt from Whitman's "Leaves of Grass", and takes up one page. The last article, "Psychology of the Nude", attempts to discuss just that—that is, the author attempts to persuade the reader that nudity alleviates the alleged ambivalence created by clothing, and that mankind would be better served if all went about nude. All articles are fairly interspersed with photographs similar to that described on the cover page. The publisher touts the magazine as "a journal seeking to equate the nude to the art of contemporary living. Its goals will be achieved by a way of free communication and an exemplary photo-artistry establishing the wholesomeness, beauty, and charm of the unadorned figure."

This magazine is the subject matter of Complaint Nos. 34590, 34591, and 34832 against petitioner John J. Hunt. With respect to Complaint Nos. 34590 and 34591, the evidence showed that on February 28, 1968, a police officer purchased the magazine from petitioner John L. Hunt at the Cozey Book Store in Boston (J.Tr. 35-41).

With respect to Complaint No. 34832, the evidence showed that on March 9, 1968, a police officer purchased the magazine from petitioner John L. Hunt, again at the Cozey Book Store in Boston (J.Tr. 28-30). At this time,

the magazine was sealed in a cellophane wrapper, and there was no label or tag covering the genital area of the model photographed on the cover page (J.Tr. 30).

J. A magazine entitled "Gymn", apparently published by NAA, Box —— 426, St. James, New York 11780. The cover page contains seven photographs of male models fully or partially undressed with genital area fully exposed. The remainder of the photographs in the magazine are of the same calibre, with emphasis being placed on the genital area. An article running throughout the magazine, interspersed with photographs, describes the cult of phallic worship, and discusses a couple of case histories in point.

This magazine, the subject matter of Complaint No. 34928 against James Hunt, was recovered from petitioner James Hunt's Cozey Book Store in Boston (J.Tr. 42-45). While on the shelf, it was wrapped in a cellophane covering (J.Tr. 45).

K. A magazine entitled "Esoteria", Volume #1, published by Esoteria Company, P.O. Box 35385, Los Angeles, California, 90035, copyright 1968. This magazine devotes itself fully to sadism, masochism, and other forms of sexual deviations. Many photographs depict beatings of male and female models by the opposite sex, and are accompanied by articles dealing with sadism, masochism, bondage, and the like. Ten pages of the magazine are devoted to "Personal Ads" in which persons write in explaining their particular deviations and invite others to correspond.

This magazine, the subject matter of Complaint No. 34926 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston for a price of $3.00 (J.Tr. 55-61).

L. A magazine entitled "Les Girls", Volume #1. The cover page depicts a photograph of a model fully disrobed with breasts and genital area fully exposed. The remainder

of the photographs in the magazine are of the same nature as that on the cover page, with principal emphasis being placed upon the perineal area and vulva. The warning, "Adults Only", is printed on the cover page. There is no statement as to ownership, publisher, or distributor, although there is a statement on the inside front cover page to the effect that the magazine is intended for serious minded artists.

This magazine, the subject matter of Complaint No. 34927 against petitioner James Hunt, was purchased from Hunt at the Cozey Book Store in Boston (J. Tr. 42-47). It was sealed in a cellophane or plastic wrapper (J.Tr. 45), and sold for a price of $2.00 (J.Tr. 44).

Argument

1. All petitioners contend that their convictions must be reversed because the complaints failed to allege that they sold, or possessed with intent to sell, the magazines with the necessary *scienter*. See *Smith* v. *California*, 361 U.S. 147. In our view, however, petitioners' argument fails to reach constitutional dimension. Each complaint was drawn according to the statutory language of Mass. Gen. Laws, ch. 272, § 28A. In *Demetropolis* v. *Commonwealth*, 342 Mass. 658, 661 (1961), the Massachusetts Supreme Judicial Court construed the statute "* * * as if it contained the words 'knowing it to be obscene, indecent or impure.'" Thus, the complaints, drawn in the language of that statute as construed by the highest court of the Commonwealth of Massachusetts, properly charged the necessary element of *scienter*. Petitioners make no contention here that they were not apprised of the elements of the offense or offenses with which they were charged, or that the form of the complaints does not show with accuracy to what extent they may, in a subsequent proceeding, plead former acquittal

or conviction. See *Russell* v. *United States,* 369 U.S. 749. There is thus no occasion for further review of this issue.

2. All petitioners contend that the sale and distribution of the subject magazines is fully protected by the First Amendment to the United States Constitution. We discuss below, first, what we believe to be the controlling test, and secondly, the applicability of the controlling law to the magazines in question.

A. In our view, the applicable test was set forth in *Roth* v. *United States,* 354 U.S. 476, as further elaborated upon in *Memoirs* v. *Massachusetts,* 383 U.S. 413. Under those cases, the commercial sale and distribution of material does not enjoy First Amendment protections if it is established that (*Memoirs, supra,* at 418):

> * * * (a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material is utterly without redeeming social value.

Redrup v. *New York,* 386 U.S. 767, upon which petitioners primarily rely, is not to the contrary. In that case, consolidating three appeals, this Court granted certiorari "* * *upon the hypothesis that the material involved in each case was of a character described as 'obscene in the constitutional sense' in *Memoirs* v. *Massachusetts,* 383 U.S. 413, 418." 386 U.S. at 769-770. Finding that hypothesis — i.e., that the material was "obscene" within the meaning of *Memoirs*—invalid, this Court accordingly reversed. Nothing in *Redrup,* therefore is inconsistent with *Memoirs.* Indeed, only last term this Court reaffirmed the principle that (*Stanley* v. *Georgia,* 37 U.S.L.W. 4315, 4317):

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with obscenity. * * * *Roth* and the cases following discerned such an "important interest" in the regulation of *commercial distribution* of obscene material (Emphasis added).

Since the present case concerns itself with the regulation of commercial distribution of obscene material, it is our view that *Roth* and *Memoirs* is controlling in the circumstances.

B. Applying what we believe to be the controlling test under *Roth* and *Memoirs,* it is our view that the magazines here in question—all of which, through camera technique, emphasizes, not the whole woman, but the breasts, perineal area, vulva, and anus (cf. *Youngstown* v. *De Loreto,* 6 Cr. L. Rept. 2053)—are obscene in the constitutional sense; that is, each and every magazine, as a whole, appeals exclusively to a prurient interest in sex, is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and is utterly without redeeming social value.

(a) "Exciting" and "Cover Girl". All volumes of these two magazines are of essentially the same format. It is obvious from the repeated use of contortionistic poses designed to emphasize the perineal area, and, in some instances, anus, that the publishers intended the magazines to and that the magazines in fact do, appeal solely to a prurient interest in sex. Although it cannot be denied that the female body is ordinarily a thing of beauty, that beauty slips by the wayside and photographs becomes patently offensive to contemporary community standards when the camera, through the technique of fine focusing, isolates the perineal area, vulva, and anus, from the rest of the body. Moreover, although the publishers, in an obviously contrived effort to bring themselves within the rulings of this Court, proclaim that the magazine is intended for artists

having difficulty finding live models, that self-serving declaration hardly amounts to a showing that the magazine has the slightest bit of redeeming social value. To be sure, nude photography and artistry has always enjoyed acceptance in the arts as we have known it. Never, however, has it been suggested that the art of nude photography (except, perhaps, by the publishers of these publications, and by the photographers who earn their keep by supplying photographs to these magazines), or other forms of nude artistry, embraces a sub-school which deals exclusively with the female perineal area, vulva, or anus. Such a suggestion would distort the meaning of the "arts" as we know it, and finds no support in the history of art. It is thus our view that the above named magazines are obscene in the constitutional sense.

(b) "Suzette" and "Wonder Girl". These two magazines differ only in format and content from "Cover Girl" and "Exciting" by the fact the former two magazines contain a series of articles dealing with nudity and art. In view of the obvious shallowness of these articles, however, it is abundantly clear that they were placed in the magazine solely in order to give a veiled semblance of legitimacy, and to fill those pages not previously filled with photographs of models placed in contortionistic poses designed to emphasize the perineal area and vulva. In all other respects, these magazines do not differ from "Cover Girl" and "Exciting", and are clearly obscene in the constitutional sense.

(c) "Countess" and "Les Girls". These two magazines are of the same mold as those discussed above. Additionally, it is our view that the lack of social worth of these two magazines is dramatically pointed out by the fact that the owner, publisher, and distributor, refuse to disclose their identity, or associate themselves with the content of the publications. These two magazines are obscene in the constitutional sense.

(d) "Gymn". Although the publishers of this magazine tout it as the magazine for male athletes, it is clear — in view of the fact that all photographs focus upon and emphasize the penis, and that the only article in the magazine concerns itself with the cult of phallic worship — that the publishers of the magazine intended it to, and that the magazine in fact does, appeal to a prurient interest in sex. Page after page of males posed in positions designed to place principal emphasis upon the penis is clearly patently offensive to contemporary community standards relating to sexual matters, and is utterly without redeeming social value.

(e) "Esoteria". This magazine concerns itself with every sexual deviation possible — both pictorially and descriptively — and provides ten pages in which persons with such deviations may advertise their wares to others. Neither the pictures nor the accompanying descriptions serve any known social value, and it is clear that these deviations affront contemporary community standards relating to sexual activity. Since the magazine devotes itself exclusively to particular forms of sexual deviations, it is clear that the publishers intended it to, and that the magazine in fact does, appeal exclusively to a prurient interest in sex. This magazine is obscene in the constitutional sense.

C. If we are wrong in our position that these magazines are obscene *per se* in the constitutional sense, it is nevertheless our position that most of the convictions here involved are sustainable on other grounds.

(a) Complaint Nos. 34142 and 34143. These complaints charged petitioner Marangi with selling, and possessing with intent to sell, the magazine entitled "Exciting", Volume #8. As set forth more fully in the Statement, Marangi, in response to a question as to whether the photographs on the inside of the magazine were comparable to that on the cover page, stated, "Yes it is ... It's even *worse* than

that inside." (J. Tr. 8-9) (Emphasis added). In our view, Marangi's response indicates that the magazine was being pushed solely as a vehicle to stimulate the prurient interest of the buyer, and that the convictions were therefore proper under *Ginsburg* v. *United States*, 383 U.S. 463; see also, *Redrup* v. *New York*, 386 U.S. 767.

(b) Complaint Nos. 34073 and 34074. These complaints charged petitioner Johnson with selling, and possessing with intent to sell, the magazine entitled "Exciting", Volume #9. The evidence showed that Johnson touted this magazine as "provocative enough", and assured that it would "incite you or arouse you." (J. Tr. 49). In these circumstances, the court below could have properly found that the convictions were authorized by *Ginsburg, supra.*

(c) Complaint Nos. 35273, 34983, and 34984. Complaint No. 35273 charged petitioner Joseph Palladino, Sr., with possessing "Cover Girl", Volume #8, with intent to sell. Complaint No. 34983 charged petitioner Joseph Palladino, Sr., with possessing "Wonder Girl" with intent to sell; and Complaint No. 34984 charged petitioner Rausch with sale of "Cover Girl", Volume #8, and "Countess". With respect to all the complaints, the evidence showed that the subject magazines were sold, or possessed with intent to sell, at the 200 Book Club in Boston. The testimony clearly showed that on the outside of this store, "Adults Only" and "No Minors Allowed" signs were placed near the entrance (P. Tr. 10-11, 56-57). In our view, this supposed warning amounts to nothing less than the song of the Sirens, luring customers into the store with the promise that provocative material lies just ahead. Thus, in this instance, the court below properly could have affirmed the convictions on these complaints on the ground that the magazines were pandered in the same manner as that in *Ginsburg, supra.*

(d) Complaint No. 34833. This complaint charged peti-

tioner John L. Hunt with possession with intent to sell the magazine, "Cover Girl", Volume #9. As heretofore set out, the cover page of that magazine contains a photograph of a model in which the breasts and genital area are fully exposed. Like all of the other magazines here in issue, this magazine was placed on the rack in a cellophane or plastic wrapping. However, unlike many of the other magazines, there was no label, tag, or other device used to cover the genital area while on display (J. Tr. 30). In our view, government has a legitimate interest in taking measures designed to prevent "* * * an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *Alexandria,* 341 U.S. 622; *Public Utilities Commission* v. *Pollak,* 343 U.S. 451." *Redrup* v. *New York,* 386 U.S. 767, 769. Although ours has been variously described as a more enlightened and less Victorian society, it is nevertheless clear that there are those who consider exposure to pictures such as that on the cover page of "Cover Girl", Volume #9, as a personal affront to their character. Government has the right to take such action as necessary to prevent persons browsing in book stores from such personal affronts, and the court below properly could have affirmed the conviction against petitioner John L. Hunt on that basis.

(e) Complaint Nos. 34593 and 34594. These complaints charged petitioner Osmond with selling, and possessing with intent to sell, "Cover Girl", Volume #14. The evidence showed that above the rack upon which the magazine was placed, a sign warned, "Adults Only" (J. Tr. 21-22). As set forth above, it is our view that this alleged warning is nothing less than a pandering of the materials as such that would appeal to a prurient interest in sex, and that the convictions were therefore proper under *Ginsburg, supra.*

(f) Complaint Nos. 34590 and 34591. These complaints charged petitioner John L. Hunt with selling, and possessing with intent to sell, the magazine entitled "Suzette". Printed upon the cover page of that magazine is the warning, "Adults Only." In our view, this warning is no less an aspect of pandering than similar signs placed upon the walls or entrance of the bookstore, and petitioner John L. Hunt was properly convicted on these complaints. *Ginsburg, supra.*

(g) Complaint No. 34929. This complaint charged petitioner Johnson with possessing with intent to sell "Wonder Girl". On the front cover of that magazine is the warning, "Adults Only". For the reasons stated immediately above with respect to Complaint Nos. 34590 and 34591, petitioner Johnson was properly convicted on this complaint. *Ginsburg, supra.*

(h) Complaint No. 34832. This complaint charged petitioner John L. Hunt with possessing with intent to sell the magazine, "Suzette". As mentioned above, the warning "Adults Only" was imprinted on the cover page, and the conviction was therefore proper under *Ginsburg, supra.* Moreover, the evidence showed that the cover page displayed a photograph of a model whose breasts and genital area were fully exposed. No label or tape covered the genital area of the model while the magazine was displayed on the rack. (J. Tr. 30). The conviction was therefore proper on the further ground that government has a legitimate interest in protecting other patrons from such offensive intrusions against their will. *Redrup, supra.*

(i) Complaint No. 34927. This complaint charged petitioner James Hunt with the sale of the magazine, "Les Girls." The warning "Adults Only" is imprinted upon the cover page. For the reasons more fully stated above, the conviction on this complaint was proper. *Ginsburg, supra.*

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorney General.
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division.
LAWRENCE P. COHEN,
Deputy Assistant Attorney General.

GARRETT H. BYRNE,
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Suffolk County.
THEODORE A. GLYNN, JR.,
Assistant District Attorney,
Suffolk County.

UPREME COURT, U. S.

JAN 3 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1969

No. 458

CHARLES JOHNSON; LEO MARANGI;
JOSEPH M. PALLADINO, SR.; JOHN HUNT;
ROBERT W. OSMOND; ALFRED STANLEY HUGHES, JR.;
JAMES H. HUNT; FRANCIS X. RAUSCH

Petitioners

vs.

COMMONWEALTH OF MASSACHUSETTS

Respondent

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

PETITION FOR REHEARING

ROBERT E. SMITH
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Counsel for Petitioner

JOHN PINO,
HARRY B. SHADOAN

Of Counsel

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PETITION FOR REHEARING

Joseph M. Palladino, Sr., one of the Petitioners in the within proceedings, respectfully moves this Court for an order, (1) vacating its denial of the petition for writ of certiorari, entered on December 15, 1969, and (2) granting the Petition.

As grounds for this motion, Petitioner states:

1. THE GRANT OF A MOTION TO STAY THE TEMPORARY INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN BYRNE V. KARALEXIS, CIVIL ACTION NO. 69-665-J, OCTOBER 1969 TERM.

On December 15, 1969, the day on which the denial of certiorari was made in the instant case, Mr. Justice Black and Mr. Justice Douglas dissenting, this Court granted a Motion to Stay the Temporary Injunction entered by the United States District Court for the District of Massachusetts, Three-Judge Court, Civil Action No. 69-665-J, filed in this Court by Garrett Byrne, District Attorney for Suffolk County, Commonwealth of Massachusetts.

The stay granted by this Court was in the following words:

"granted pending the timely filing and disposition of an appeal. Should such an appeal not be filed, this stay is to expire automatically. Should such an appeal be timely docketed, this stay is to continue pending the Court's action on the jurisdictional aspect of the case. In the event the appeal is dismissed or the judgment below is summarily affirmed this stay is to expire automatically. Should the Court note probable jurisdiction of the appeal or postpone further consideration of the question of jurisdiction to the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court."

The substance of the Karalexis decision by the majority of the Three-Judge Court in the United States Dis-

trict Court for the District of Massachusetts, reported in the opinion rendered November 28, 1969, granting a Temporary Restraining Order, was that substantial federal constitutional question was presented by the pleadings and that there was a probability that the plaintiffs (Karalexis) would prevail.

Karalexis made a frontal attack upon the Commonwealth of Massachusetts Obscenity Statute, (Mass. G.L. c 272, Sec. 28a) based upon the recent decision of this Court in Stanley vs. Georgia, 1969, 394 U.S. 557. The U.S. District Court was asked to rule that the Stanley decision extends to a case where the possessors permitted a number of consenting adults to view their possibly obscene picture in a moving picture house.

The Federal Court held that for the purposes of the case before them, they would assume that the film, (I Am Curious, Yellow) was obscene by standards currently applied by the Massachusetts Courts.

In it's ruling, the U.S. District Court by Circuit Judge Aldrich stated in pertinent part:

> "Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier. A constitutional right to receive a communication would seem meaningless if there were no coextensive right to receive a communication would seem meaningless if there were no coextensive right to make it. Cf. Griswold vs. Connecticut, 1965, 381 U.S. 479. If a rich Stanley can view a film, or read a book, in his home, a poorer Stanely should be

> free to visit a protected theatre or library. We see no reason for saying he must go alone."

In conclusion, the Court states:

> "We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional."

It would appear that the statute under consideration by the United States District Court for the District of Massachusetts in the Karalexis case is the same statute (Chapter 272 of the General Laws of the Commonwealth of Massachusetts, Section 28A, as amended.) as was involved in the petition for certiorari to this Court in the Johnson et al. case, No. 458 in this Court.

Should this Court summarily affirm the judgment below, the probable effect would be that a Permanent Injunction would issue from the United States District

Court holding the Massachusetts statute to be unconstitutional in the context of controlled access or circulation of allegedly obscene materials, to interested adults.

Should this Court in the Karalexis case note probable jurisdiction and hear the matter on the merits, the decision of this Court would in essence, as to the merits agree or disagree, or perhaps modify and explain.

In the Palladino case, the Petitioner was operating an adults only bookstore with no independent solicitation of members of the public wherein the publications were held out to be obscene. The publications were for sale to interested adults only and in a true sense the circumstances of sale and offering for sale comport with the con-

cept of a controlled access library.

Petitioner herein proffers that the whole tenor of the matters to be reviewed in Byrne vs. Karalexis bears a striking resemblance to the considerations necessarily involved in the instant case. If the statute is unconstitutional then the criminal conviction of Palladino under such an unconstitutional statute would and should be a nullity.

Should this court decline to vacate its Order denying the petition for writ of certiprari, entered on December 18, 1989, the effect thereof will be to require Petitioner to go to jail to serve his sentence while this Court considers the issues raised in Byrne vs. Karalexis which may be dispositive of the issue of the constitutionality of the Massachusetts obscenity statute (Chapter 272

of the General Laws of the Commonwealth of Massachusetts, Section 28 A, as amended.) Should this Court consider the said statute unconstitutional, Petitioner will be unable to obtain any relief from a jail sentence already served.

For these reasons, therefore, the denial of certiorari as to this Petitioner should be reconsidered to the end that this case be heard and resolved simultaneously with the Lynne vs. Karalexis case.

2. THE VIOLATION OF THE PRINCIPLES OF COLE V. ARKANSAS 222 U.S.196

This Petitioner is entitled as a matter of substantive and procedural due process to have the validity of his conviction in this court appraised "on consideration of the case as in this court appraised "on consideration of the case as the issues were determined in

the trial court." Cole vs. Arkansas 333 U.S. 196, 202. The Commonwealth by its Counsel have violated this fundamental principle of jurisprudence by their Brief in Opposition before this Court as to Petitioner, Palladino.

Petitioner was tried below on the issue of the obscenity of the publications. No issue of pandering was before the trial court to escalate otherwise "borderline" material to "obscene" material. Ginsburg vs. U.S. 383 U.S. 463 (1966)

The Commonwealth in its Brief in Opposition on page 18, relates that the sign on the outside of the store where Petitioner was employed contained the language, "ADULTS ONLY". Another sign near the entrance stated, "NO MINORS ALLOWED"

The Commonwealth in its brief as to this point stated:

"In our view this supposed warning amounts to nothing less than the song of the sirens, luring customers into the store with the promise that provocative material lies just ahead. Thus, in this instance, the court below properly could have affirmed the convictions on these complaints on the ground that the magazines were pandered in the same manner as that of Ginsburg, supra."

This Court in Redrup vs. New York, 386 U.S. 767, and later in Stanley vs. Georgia, 394 U.S. 557, deemed significant the absence of any evidence in the cases before the Court of sale or distribution of the publications in a manner intruding on the privacy of an unwilling individual who wanted to avoid

confrontation with the material, and no sales to minors under any state etc. reflecting a specific and limited concern for juveniles.

Certainly the signs changed by Respondent as pandering, thus in the opinion of the commonwealth, escalating "borderline" material to "obscenity" were only in an effort to comply with the dictates of this Court as understood by this Petitioner.

For offering "borderline" publications in a non-offensive manner, excluding minors, and thus attempting to comply with Breard vs. Alexandria, 341 U.S. 622; Public Utilities Comission vs. Pollak, 343 U.S. 451; Redrup vs. N.Y., supra, and it's progeny; and Stanley vs. Georgia supra, the Commonwealth accuses Petitioner here for the first time of "pandering".

Yet if the "borderline" publications are offered in other than an "Adults Only" store, in conjunction with news publications and magazines of general interest, and where no effort is made to exclude minors, the Commonwealth then argues;

"Government has the right to take such action as necessary to prevent persons browsing in book stores from such personal affronts..." Page 19, Brief in Opposition.

To paraphrase a popularly heard expression, "You are condemned to damnation if you do, and you are condemned to damnation if you don't."

This is precisely the position of the Petitioner, Palladino. Said Petitioner was thereby deprived of his right to have his conviction reviewed on the basis of

the theory of the original prosecution. Contrariwise, Petitioner has both denied any right to a trial on the new theory advanced by the Commonwealth in this Court as argued in his brief in opposition. This combination of circumstances is grossly violative of the principles of Colombe, supra, as to call for a re-evaluation of the denial of certiorari and to permit Petitioner's conviction to be appraised by this Court on the basis of the charges actually made against him and considered by the trial court.

3. THE CONFLICT BETWEEN DECISIONS ON THE NECESSITY FOR REQUIRING THE PROSECUTION TO AFFIRMATIVELY PROVE "PRURIENT APPEAL" AND "CONTEMPORARY COMMUNITY STANDARDS"

The Supreme Judicial Court of the Commonwealth of Massachusetts, affirmed the conviction of Petitioner, Palladino,

based on a trial record barren and devoid of any affirmative showing by the prosecution that the material appealed to prurient interest of any persons, or that the material exceeded or affronted contemporary community standards in the representation or depiction of sex or nudity.

This is in conflict with the relevant decisions of various appellate courts as follows:

a. U.S.A. vs. Klaw, 350 F. 2d 155 (CA-2)

"Absolutely no evidentiary basis from which to recognize any appeal to the prurient interest of the deviate or typical recipient...Because there was insufficient evidence for the jury to consider Nutrix material obscene under any proper view of the Roth test, the

"motion for directed verdict of acquittal should be granted." See footnote 14.

b. In Re. Giannini, 72 Cal Rptr. 655

"We conclude that the convictions must be set aside because the prosecution failed to introduce any evidence of community standards, either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency."

c. House vs. Commonwealth, 169 S.E. 2d 572 (September 5, 1969 - Va.)

"The question presented to us is whether the evidence on behalf of the Commonwealth was sufficient to warrant a finding that tested by the principles outlined in this instruction these publications are obseene. We agree with the defendant that it was not sufficient." ..."In the first place

"there is no evidence that according to or applying contemporary community standards the cominant theme of the magazines in question appealed to the prurient interest of the reader, or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the descriptions of such matters."

In a decision rendered by the Supreme Court of the Commonwealth of Pennsylvania after the filing of the Petition for Writ of Certiorari herein and the Commonwealth's Brief in Oppos-

ition, Duggan vs. Guild Theatre, Inc. 258 At. 2d. 858, decided on November 11, 1969. The Court there reversed in part based on the absence of any affirmative evidence by the District Attorney in the trial that the material had any prurient appeal or that it affronted contemporary community standards. In the absence of such evidence, the burden of proof failed, and the case reversed.

Certainly, to comport with due process Petitioner should have been adjudged "Not Guilty" in the absence of any constitutionaly relevant evidence adduced by the prosecution of "prurient appeal" and that the materials affronted "contemporary community standards."

The decisions referenced herein, several of which were handed down after the Petition for Writ of Certiorari was filed,

makes it clear that the Courts of the Commonwealth of Massachusetts in failing to require any affirmative evidence on the issue of "prurient appeal" or "contemporary community standards" are certainly in conflict with the prevailing legal theory, and the recent appellate court decisions.

For this reason, Petitioner is entitled to have the Order denying his Petition for Writ of Certiorari vacated and the writ thereafter granted, and the Supreme Judicial Court of Massachusetts reversed.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for writ of certiorari, Petitioner, Palladino, prays that this Court grant the petition and review the judgment and

ruling belc

Respectfully submitted.

Robert Eugene Smith
Counsel for Petitioner

January 9, 1970

CERTIFICATE OF COUNSEL

As counsel for Petitioner, Ihereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2)

Robert Eugene Smith
Counsel for Petitioner

January 9, 1970

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 458

Charles Johnson; Leo Marangi; Joseph M. Palladino, Sr.,; John L. Hunt; Robert W. Osmond; Alfred Stanley Hughes, Jr.; James H. Hunt; Francis X RAusch

Petitioners

Vs.

THE COMMONWEALTH OF MASSACHUSETTS

Certificate of Service

I hereby certify that on this 8th day of January, 1970, copies of this Petition were mailed, postage prepaid, to the following:

Robert H. Quinn, Esquire
Attorney General of the Commonwealth of Massachusetts
Boston, Massachusetts

John Wall, Esquire
Assistant Attorney General
Chief, Criminal Division
Boston, Massachusetts

Lawrence P. Cohen, Esquire
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Boston, Massachusetts

Garrett H. Byrne, Esquire
District Attorney, Suffolk County
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Theodore A. Glynn, Jr.
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I further certify that all parties required to be served have been served.

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